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No. 84-_____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JULIUS M. GERZOF,

Appellant,

—against—

THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT AND APPENDIX

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

JULIUS M. GERZOF, Appellant,

v.

THE GRIEVANCE COMMITTEE FOR

THE TENTH JUDICIAL DISTRICT, Appellee.

ON APPEAL FROM THE COURT OF APPEALS

OF NEW YORK

JURISDICTIONAL STATEMENT

Julius M. Gerzof, the appellant, appeals from the final judgment of the Court of Appeals of New York, dated September 18, 1984 dismissing his appeal from the Order of Disbarment of the Appellate Division of the Supreme Court of the State of New York

(Second Department), dated May 29, 1984 which order implicitly held that N.Y. Judiciary Law § 90 (McKinney 1983), p. 98a, infra, and 22 NYCRR Part 691, p. 124a infra, on their face and as applied in this case, are not unconstitutional as violative of appellant's rights to due process of law and equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether N.Y. Judiciary Law § 90 (McKinney 1983) and 22 NYCRR Part 691 are violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, on their face and as applied to disbar an attorney from the practice of law where:

A. Appellant was subjected to pre-judgment punishment, i.e., he was presumed guilty until proven innocent, without any "probable cause" determina-

tion that the charge against him was meritorious, or without notice of, and an opportunity to be heard in conjunction with any "probable cause" determination as may have been made.

B. Appellant has been found guilty of a charge denoted "Charge Two", which alleged that he had failed to report to the Appellate Division of the Supreme Court of the State of New York that he was engaging in the practice of law while suspended therefrom. Since, pursuant to N.Y. Judiciary Law § 486 (McKinney 1983), the practice of law by one suspended therefrom constitutes a misdemeanor, said finding of guilt deprived appellant of his right, pursuant to the Fifth Amendment to the Constitution of the United States to be free from self-incrimination.

C. Appellant was denied any meaningful opportunity to prepare to answer,

meet, confront, refute, rebut, disprove, try or otherwise defend himself from the charges and evidence against him in that:

(1) his request for an opportunity to appear before appellee Grievance Committee prior to initiation of formal charges against him was denied;

(2) his motion for a more definite statement of the charges was denied;

(3) his requests and motions for pre-trial discovery, including a list of witnesses, prior statements of witnesses, depositions, exculpatory information and the Report of the prosecuting body, the appellee, upon which authorization to prosecute the proceeding against appellant was based were rejected and denied;

(4) his demand for a bill of particulars was vacated;

(5) he was denied issuance of a trial subpoena to compel production of: (i) the Report of the prosecuting body, the appellee, upon which authorization to prosecute the proceeding against him was based; (ii) statements of witnesses interviewed by the appellee; and (iii) exculpatory information contained in the file of appellee;

(6) pursuant to a ruling on consent of appellant and appellee, the parties were required to have their trial subpoenas submitted to the Special Referee for endorsement; however in violation thereof, appellee issued and served trial subpoenas without notice to appellant and without approval of the Special Referee;

(7) he was foreclosed from full cross-examination of the witness-in-chief against him by virtue of the

facts that: (i) his proposed subpoenas to the witness-in-chief were not allowed by the Special Referee; (ii) he was not permitted to explore said witness' admitted drug addiction insofar as same reflected on the witness' competence, recollection, credibility, hostility and motivation toward appellant; (iii) he was not permitted to explore prior vicious immoral and wrongful acts of said witness as same related to his credibility; after in camera inspection of said witness' file maintained by the Committee on Character and Fitness for the Second, Tenth and Eleventh Judicial Districts, the Special Referee declined to permit appellant or his counsel to examine same and declined to introduce any parts thereof into evidence;

(8) trial counsel for appellee

was guilty of prosecutorial misconduct substantially affecting the result, by virtue of the facts, inter alia, that: (i) he failed to follow the rules of the tribunal regarding the issuance of trial subpoenas; (ii) he permitted his witness-in-chief to give knowingly false testimony, without calling same to the attention of the tribunal; (iii) he misstated to the tribunal his knowledge of relevant facts concerning his investigation of the case against appellant particularly as same related to said witness' tape recorded extortion attempts of appellant.

D. Appellant has been deprived of a full opportunity to defend himself, by virtue of the facts that: (i) there has been an impermissible union of the functions of prosecutor, judge and jury because the Appellate Division, the body

which imposes discipline, appoints the members of appellee Grievance Committee and its counsel and the Special Referee assigned to preside at the hearing of disciplinary charges and to report thereon, and permits secret communications between or among itself and them, such as the Report of the appellee Grievance Committee upon which the Appellate Division granted leave to prosecute the disciplinary proceeding against appellant, a Report kept secret, to this day, from appellant, and then hears and determines the matter itself, without oral argument. (These constitutional infirmaties are fully presented herein and are set forth in detail by Federal District Court Judge Jack B. Weinstein in Mildner v. Gulotta, 405 F.Supp. 182, 201 (dissenting opinion).); (ii) the Appellate Division failed and refused to require the Special Referee who presided

at the hearing of the disciplinary charges to identify and state his findings of fact and conclusions of law so that appellant could appropriately frame his motion to disaffirm said report; (iii) no right of appeal on questions of law or fact was afforded appellant; (iv) in confirming the Report of the Special Referee the Appellate Division set forth neither findings of fact nor conclusions of law; (iv) the Appellate Division has found the appellant guilty of a "charge" as to which no evidence was introduced at the disciplinary hearing and without identifying the "evidence" it relied upon and affording appellant the opportunity to confront and rebut same.

E. There was upon the record a total absence of proof that appellant had engaged in the practice of law while suspended therefrom in that, inter alia: (i) no testimony or other proof was sub-

mitted that appellant ever held himself out as an attorney to any client, prospective client, attorney, court or tribunal; (ii) no testimony or other proof was submitted that appellant had received any fee for legal services; (iii) no testimony or other proof was submitted that appellant had appeared as an attorney for any client before any court or other tribunal or in the negotiation of any transaction.

F. Appellant was denied the opportunity to present oral argument, through counsel or otherwise, before the Appellate Division which passed judgment and imposed the discipline of disbarment on him.

G. The investigation and presentation of charges against appellant were unconstrained by time limitation and so far exceeded any reasonable time limits especially considering that: (i) appel-

lant's application for reinstatement to the Bar following the expiration of a prior period of suspension from the practice of law was being held in abeyance during the investigation and pendency of the charges against him; and (ii) other, more speedy alternatives existed under law to redress the alleged wrongdoing of appellant, such as opposition to appellant's application for reinstatement before the Committee on Character and Fitness (22 NYCRR 691.11 (d)); criminal prosecution (N.Y. Judiciary Law § 486 (McKinney 1983)); or contempt proceeding (N.Y. Judiciary Law § 90(2)(b) (McKinney 1983)).

H. Appellant's guilt was not proved beyond a reasonable doubt or by clear and convincing evidence.

I. The final disposition of the charges against appellant was inordinately delayed from the date of submis-

sion of post-trial memoranda until issuance of the order of disbarment (over 23 months), especially considering that during such time appellant remained separated from the practice of law, long after the scheduled expiration of his prior period of suspension, his reinstatement application held in abeyance pending disposition of the charges, all without any hearing or "probable cause" determination. Thus, the total period of suspension of appellant from the practice of law, following expiration of the prior three-year suspension and pending the investigation, hearing and determination of the "new" charges exceeded three and one-half years.

II. Whether N.Y. Judiciary Law § 90 (McKinney 1983) and 22 NYCRR Part 691 are violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, on their face

and as applied to disbar an attorney from the practice of law where:

A. Attorneys subject to professional discipline, as contrasted with all other litigants in the State of New York, civil, criminal and administrative, are permitted no appeal as of right from erroneous findings of fact (no matter how insubstantial the evidence) or erroneous (non-constitutional) conclusions of law (no matter how egregious the errors).

B. Attorneys subject to professional discipline as contrasted with all other professionals and licensed tradespeople in the State of New York, are permitted no appeal as of right from erroneous findings of fact (even under the substantial evidence test) or erroneous (non-constitutional) conclusions of law by the disciplinary authority.

C. Attorneys subject to professional

discipline, as contrasted with all other litigants in the State of New York, civil, criminal or administrative, are not protected by any enforceable (by dismissal) temporal standards applicable to the prosecution of cases against them.

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OPINIONS BELOW

The opinion of the Court of Appeals of New York, which appears in the appendix hereto, p. 1a, infra, is not yet reported.

The opinion of the Appellate Division of the Supreme Court of New York (Second Department), which appears in the appendix hereto, p. 4a, infra, is reported at 101 A.D.2d 451, 476 N.Y.S.2d 21 (1984).

The Report of the Special Referee appointed by the Appellate Division of the Supreme Court of New York (Second Department) is not reported. It is reprinted in the appendix hereto, p. 14a, infra.

JURISDICTION

In this attorney disciplinary proceeding, the judgment of the Court of Appeals of New York, from which this appeal is taken, dismissing appellant's appeal from the order of the Appellate Division of the Supreme Court of New York (Second Department) disbarring appellant from the prac-

tice of law was entered on September 18, 1984 in the New York Court of Appeals.

A notice of appeal to this Court was duly filed in the New York Court of Appeals on December 13, 1984 and in the Appellate Division of the Supreme Court of New York (Second Department) on December 12, 1984. See p. 91a, infra.

This appeal is being docketed in this Court within ninety (90) days from the judgment of the New York Court of Appeals, and is taken pursuant to 28 U.S.C. §1257 (2) in that there was drawn into question below the validity of a state statute and regulation and the decision was in favor of their validity.

RAISING THE FEDERAL QUESTIONS

At the earliest stage of the disciplinary proceedings below the appellant raised the claim, in a motion to dismiss the petition and charges against him, and his "proposed verified answer" therein

contained that N.Y. Judiciary Law § 90 and 22 NYCRR Part 691 on their face and as applied deprived him of Due Process and Equal Protection of the Law. By denying that motion, the Appellate Division implicily rejected appellant's constitutional claims. Appellant's federal constitutional claims were repeated and reiterated throughout the course of the proceedings below, e.g.; in motion practice seeking pre-hearing discovery; in a motion to dismiss made at the commencement of the disciplinary hearing; in his opening statement and at other points throughout the hearing and in his post-hearing memorandum; on his motion to remit to the Special Referee for findings of fact and conclusions of law; on his cross-motion to disaffirm the Report of the Special Referee; and on appeal to the New York Court of Appeals.

That appellant raised these issues is

clear from the Report, p. 14a, infra, wherein the Special Referee specifically recognized and rejected some of appellant's constitutional claims and felt himself bound by precedent, including this Court's recent decision in Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S. Ct. 2515 (1982), from considering appellant's other constitutional arguments.

The Appellate Division in its decision, inter alia, confirming the Report of the Special Referee, although not addressing the very significant constitutional issues raised, specifically noted that the Special Referee had conducted a "fair hearing" (p. 7a, infra), thereby implicitly recognizing, albeit rejecting, appellant's constitutional claims.

The New York Court of Appeals, in dismissing appellant's appeal from the order of disbarment found "no substantial con-

stitutional question...directly involved" (p. 1a, infra), but did not rule that appellant had failed to assert or preserve properly his constitutional claims. The New York Court of Appeals therefore clearly acknowledged appellant had raised and, it therefore considered and rejected, appellant's constitutional claims.

Moreover, although clearly set forth in appellant's verified answer to the petition and disciplinary charges below, several of appellant's constitutional claims did not ripen until later stages of the proceedings in the state court, such as the denial of a right to appeal. Additional aspects of appellant's constitutional challenge to the New York State attorney disciplinary process presented by this appeal were not and could not have been anticipated at the outset of the disciplinary proceeding and only arose by virtue of orders and rulings made during

the course of the disciplinary proceeding and were properly preserved thereafter.

STATEMENT OF THE CASE

Appellant, Julius M. Gerzof, has served as a member of the Bar of the State of New York since his admission to practice in 1936 until October 1, 1977, the effective date of an order of suspension. In 1970, appellant appeared as a witness at a Judicial Inquiry regarding the conduct of a then-sitting Justice of the Supreme Court of the State of New York. That Justice was removed from office as a result of the Judicial Inquiry.

In 1972, appellant was named as the respondent in an attorney disciplinary proceeding charging, inter alia, that he had given false testimony before the Judicial Inquiry. Appellant was suspended from the practice of law for three years. Matter of Gerzof, 45 A.D.2d 450, 359 N.Y.S.2d 76 (2nd Dept. 1974). The suspension order

was stayed pending appellant's appeal to the New York Court of Appeals (appeal dismissed, Matter of Gerzof, 35 N.Y.2d 855, 363 N.Y.S.2d 1027 (1974)); his motion in the New York Court of Appeals for permission to appeal (denied, Matter of Gerzof, 35 N.Y.2d 644, 362 N.Y.S.2d 1026 (1974)); a federal civil rights (42 U.S.C. § 1983) action (Mildner v. Gulotta, supra, affd. 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976)); and a plenary action in the New York State Supreme Court (Gerzof v. Gulotta, 87 Misc.2d 768, 386 N.Y.S.2d 790 (Sup. Ct. Nassau 1976) affd. 57 A.D.2d 821, 395 N.Y.S.2d 26 (1st Dept. 1977) app. dism. and mot. for leave to app. den. 42 N.Y.2d 960, 398 N.Y.S.2d 146 (1977)).

In Mildner v. Gulotta, supra, appellant's complaint was dismissed on grounds of abstention. In the subsequent state court action (Gerzof v. Gulotta, supra),

the Appellate Division ruled, in affirming the dismissal of his complaint, that appellant's constitutional claims should have been raised in the context of the prior disciplinary proceeding.

In July, 1980, with appellant's three-year suspension almost at its scheduled end, he moved the Appellate Division for permission to pursue his reinstatement, so that, if successful, appellant could resume the practice of law on October 1, 1980. In opposition, appellee submitted an affidavit stating it had (then-) recently received an affidavit of one Joseph J. LaBella, Jr. dated October 8, 1979, alleging that appellant had engaged in the practice of law while suspended.

On October 6, 1980, after the scheduled termination of appellant's suspension, the Appellate Division issued an order permitting him to apply for reinstatement and referring the matter to the Committee on

Character and Fitness. Appellant duly filed his reinstatement application, but the Committee on Character and Fitness suspended consideration thereof after appellee filed a complaint, sua sponte, against appellant in November, 1980 based upon the LaBella affidavit, charging appellant with practicing law while suspended.

In February, 1981 appellant moved the Appellate Division to compel the Committee on Character and Fitness to act on his application in accordance with that court's October 6, 1980 order. By April 9, 1981 order, the Appellate Division denied that motion and directed the reinstatement application to be held in abeyance pending the institution and prosecution of new disciplinary proceedings against appellant. (see, p. 81a, infra.) By another order also dated April 9, 1981 (which order appellant saw for the first

time several months later), the Appellate Division granted appellee's application (which application has, to this date, been withheld from appellant) for leave to prosecute formal disciplinary proceedings against appellant. (see p. 87a, infra.) More than four months later, on August 18, 1981, the appellee served its petition on appellant containing two charges. Charge One alleged appellant had practiced law while suspended; Charge Two alleged appellant had filed affidavits (with the Committee on Character and Fitness and the Appellate Division) which were allegedly false because of the failure to disclose that appellant had engaged in the practice of law while suspended.

Appellant moved to dismiss the petition and charges on grounds, inter alia, that the order authorizing new disciplinary proceedings, issued without notice to and opportunity to be heard by appellant, vio-

lated his constitutional rights to due process of law because it: (i) countermanded the October 6, 1980 order of that court, referring to the Committee on Character and Fitness questions including whether appellant had complied with the prior order of suspension (which contained a specific provision prohibiting appellant from engaging in the practice of law); and (ii) constituted a punishment and deprivation of rights to pursue and achieve reinstatement and to resume the practice of law based merely on the existence of unproved charges against him. Appellant also sought, by that motion, dismissal of the petition and charges for failure to state a cause of action, or, alternatively, for a more definitive statement so that he might be able to frame a proper responsive pleading.

By the time his motion to dismiss the petition and charges was denied, on Decem-

ber 9, 1981, more than one year had elapsed from the scheduled termination of appellant's prior three-year suspension. Appellant appealed the denial of that motion together with the denial of a companion motion for immediate reinstatement made in the context of the prior disciplinary proceeding, but the New York Court of Appeals rejected his appeals. Matter of Gerzof, 56 N.Y.2d 567, 450 N.Y.S.2d 184 (1982), p. 69a, infra.

While those appeals were pending, a prehearing conference was held before the Special Referee appointed by the Appellate Division to preside at the disciplinary hearing. At that conference, a request was made for disclosure, including a list of the twelve to fifteen witnesses appellee's said he would call. That request was refused, and application was made to the Special Referee who denied same. Thereafter, appellant moved the Appellate

Division for pre-hearing disclosure, including the list of witnesses, the appellee's report on which its application for leave to prosecute the disciplinary proceeding against appellant was granted, and exculpatory information in the appellee's files. That motion was denied in all respects (p. 64a, infra), and appellant's motion for permission to appeal therefrom was denied by the New York Court of Appeals (56 N.Y.2d 612, 454 N.Y.S.2d 81, 435 N.E.2d 1096 (1982), p. 61a, infra). Appellant demanded a bill of particulars, but appellee's motion in the Appellate Division to vacate that demand was granted (p. 58a, infra).

On April 1, 1982, the hearing on the disciplinary case finally commenced before the Special Referee appointed by the Appellate Division. It was then eighteen months after the scheduled termination of appellant's prior three-year suspension,

but action on his reinstatement application was postponed because the new charges had not yet been heard and determined. On the first day of the disciplinary hearing, appellee's counsel announced his intention to call three witnesses who, as it eventuated, were never called to testify. Also, on the first day of the hearing, appellant's motion (pursuant to New York Civil Practice Law and Rules, §2307) for the issuance of a subpoena duces tecum directed to appellee was referred to the Special Referee. That subpoena sought production of the appellee's report to the Appellate Division upon which authorization to prosecute the disciplinary proceeding against appellant was granted, as well as statements taken from witnesses who were to appear at the hearing. The next day, after hearing oral argument, the Special Referee denied that motion on the ground that he was bound by the Appellate

Division's denial of appellant's motion for pre-hearing disclosure seeking substantially the same information. See p. 54a, infra.

During the disciplinary hearing, the appellant presented several subpoenas to the Special Referee for endorsement. In most instances, the Special Referee declined to authorize the subpoenas. On the other hand, appellee's counsel summoned at least one witness and documents to court by virtue of subpoenas issued in contravention of the agreed upon rule established at the hearing, a rule adopted at his own suggestion, requiring the Special Referee's prior approval of all subpoenas.

The disciplinary hearing was conducted on nineteen trial days over approximately seven weeks. Post hearing memoranda were submitted on June 25, 1982, and the matter remained pending before the Special Referee until December 29, 1982 when he

issued his Report and Recommendation. While the matter was being considered by the Special Referee, the two-year anniversary of the scheduled termination of appellant's prior period of suspension came and went; yet, appellant remained separated from the practice of law, although no finding of guilt had then been made.

The Report of the Special Referee concluded that appellant had engaged in the practice of law while suspended. With respect to Charge Two, that appellant had submitted false affidavits to the Appellate Division in that he failed to disclose that he had engaged in the practice of law while suspended, the Special Referee noted that no such affidavits were presented at the hearing and declined, therefore, to reach any conclusion. The Special Referee recommended disbarment.

Appellee's motion to confirm the Report of the Special Referee and appellant's

cross-motion to disaffirm said report were finally submitted before the Appellate Division on June 17, 1983, after appellant's application for oral argument was denied (and after appellant's motion to remit the matter to the Special Referee with directions to set forth "findings of fact" and "conclusions of law" was also denied). (See p. 50a, infra.) By the time of submission of those motions, appellant's prior three-year suspension was extended, by virtue of the charges sub judice before the Appellate Division, but still without determination, for another two and two-thirds years.

And the motions to confirm and disaffirm the Report remained sub judice before the Appellate Division for almost an additional year. In April, 1984, ten months after submission of the motions to confirm and disaffirm, twenty-three months after completion of the disciplinary hearing,

thirty-two months after service of the charges on appellant, and fully three and one-half years (forty-two months) after the scheduled termination of appellant's suspension and granting of the order permitting him to pursue his reinstatement, appellant remained suspended from the practice of law by virtue of the "new" charges against him, which charges had not yet been sustained. At that point, appellant moved the Appellate Division for dismissal of the disciplinary proceeding and for immediate reinstatement on the grounds of the extraordinary, unconscionable, and unconstitutional delay in adjudication. The Appellate Division denied that motion. (See p. 46a, infra.) On May 30, 1984, that court issued its order of disbarment. (See p. 9a, infra.) In its opinion (see, p. 4a, infra), the court found appellant guilty, not only of Charge One (that he practiced law while suspended), but of

Charge Two as well, a charge as to which, as the Special Referee had noted, no evidence had been introduced at the disciplinary hearing. The Appellate Division having before it the full record, rejected, sub silentio, all the constitutional claims appellant had raised, commenting only that appellant had received a "fair hearing".

Appellant appealed to the New York Court of Appeals. In his jurisdictional statement in that court, appellant again raised the constitutional questions he had raised throughout the proceeding below. Appellee moved to dismiss the appeal and the Court of Appeals granted that motion, on the ground that no substantial constitutional question was directly involved.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The New York Attorney Disciplinary Process. The process pursuant to which appellant was disbarred has been found, by

the only Federal Judge singularly addressing the issue, to be unconstitutional. See Mildner v. Gulotta, supra, dissenting opinion of Weinstein, J.

New York is the only jurisdiction in which administration of the attorney disciplinary process is not vested in the highest court. Rather, the legislature has delegated that authority to the Appellate Divisions of the New York State Supreme Court. See, ABA, Standing Committee on Professional Discipline, Evaluation of the Lawyer Disciplinary Systems of the State of New York (Final Report, December, 1982) at 4, (hereinafter, "ABA Evaluation").

Each Appellate Division has its own rules governing attorney disciplinary proceedings. The rules effective within the Second Department are contained in 22 NYCRR Part 691. Those rules, of course,

must be subject to the general legislative pronouncements contained in the N.Y. Judiciary Law §90 (McKinney 1983).

In the Second Department there is a two-tier disciplinary process. The Appellate Division has established local grievance committees, such as the appellee herein, and appoints their members and counsel. Grievance committees are authorized to investigate complaints of attorney misconduct made to the Appellate Division, to the committee or initiated by the committee on its own initiative. After preliminary investigation, the committee may, on majority vote, either: (a) dismiss the complaint; (b) issue a "letter of caution"; (c) privately admonish the attorney; (d) serve written charges and hold a hearing; or, (e) "...where the public interest demands prompt action and where the available facts show probable cause for such action" recommend to the Appel-

late Division the institution of disciplinary proceedings. 22 NYCRR §691.4(e,f).

The last alternative was the one followed here.

However, despite the statutory and regulatory framework, much remains uncodified, particularly with regard to procedural aspects of the attorney disciplinary process. This situation is exacerbated by the absence of any statutory, regulatory or case law pronouncement on whether general rules of New York civil or criminal procedure are applicable in the disciplinary case. A further aggravating factor is the absence of any cogent body of case law detailing, substantively or procedurally, the application of N.Y. Judiciary Law §90 or the appropriate Appellate Division rules. Cases which do not result in a finding of guilt are not reported [Judiciary Law §90(10)]; cases in which charges are sustained rarely receive exposition

and evaluation in judicial decisions. See, ABA Evaluation at 50-51.

Appeals in attorney disciplinary cases are permitted as a matter of right only where the New York Court of Appeals finds that substantial constitutional questions are directly involved. Permission to appeal in other cases is most sparingly granted. As a Presiding Justice of the Appellate Division (First Department) has phrased it: "...the appellate gate through which [the attorney] must pass has been made especially strait for him." Murphy, A Statewide Lawyer Discipline System, N.Y.S.B.J. 362, 405, a copy of which is reprinted in the Appendix hereto beginning at p. 149a, infra.

Having been subject to the New York attorney disciplinary process for more than the past decade, appellant has avidly and repeatedly pressed for an adjudication of his claims as to the constitutional

deficiencies of that system.

The three-judge court in Mildner v. Gulotta, supra, abstained, preferring to give the New York State courts first opportunity to determine those claims. In his subsequent state court action (Gerzof v. Gulotta, supra) appellant was held to have waived those claims by virtue of his failure to raise them in his first disciplinary proceeding. On this appeal, appellant has preserved for review his federal constitutional claims. He challenges as offensive to the due process and equal protection guarantees of the Fourteenth Amendment, many aspects of the New York attorney disciplinary process. While none of the precise questions raised by appellant has been decided by this Court with respect to the New York attorney disciplinary process, the final judgment of the New York Court of Appeals here is clearly at odds with prior rulings of this

Court.

By virtue of its prior rulings, this Court has deemed "substantial" procedural due process issues such as those raised here regarding the continued suspension of appellant, without hearing, pending the investigation, institution, hearing and determination of disciplinary proceedings. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (termination of welfare benefits); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (termination of tenured public employment); Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (public school suspension); Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) and Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (pre-judgment attachments, etc.); Greene v. McElroy, 360 U.S. 474, 79

S.Ct. 1400 (1959) (suspension of defense contractor's security clearance). And even where no prior hearing has been directed (see e.g. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Mitchell v. W.T. Grant, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975)), the Court has recognized that due process requires a balancing test, weighing the importance of the right, the consequences of wrongful withholding of that right, the countervailing government or private interest and the availability, fairness and expediency of post-deprivation remedies. Because New York Judiciary Law §90 and the regulations promulgated pursuant thereto do not, on their face or as applied below, adequately balance the competing interests, substantial constitutional issues are presented.

B. The Court should not decline to exercise its mandatory jurisdiction on grounds of comity or because attorney disciplinary proceedings are purely a state concern. The Special Referee in his Report (p. 17a, infra) found this Court's opinion in Middlesex County Ethics Committee v. Garden State Bar Association, supra, to support the constitutionality of the New York attorney disciplinary process and to all but insulate that process from scrutiny by federal courts. However, the language and rationale of Middlesex supports the assertion of jurisdiction here. Middlesex involved an on-going state disciplinary proceeding. It did not signal that this Court would abandon its role and duty to determine whether state proceedings involving attorneys recognize and respect federal constitutional rights. See, e.g. Willner v. Committee on Character and Fitness, 373 U.S. 96, 83

S.Ct. 1175, 101 L.Ed.2d 224 (1963); Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); In Re Primus, 436 U.S. 412, 98 S.Ct. 1895, 56 L.Ed.2d 417 (1978); In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). In its constitutional reviews of attorney disciplinary proceedings this Court has clearly stated that Fourteenth Amendment guarantees apply equally to lawyers as to other citizens: "...lawyers also enjoy first-class citizenship." Spevack v. Klein, 385 U.S. 511, 516, 87 S.Ct. 625, 629, 17 L.Ed.2d 574 (1967).

C. The pre-judgment suspension of appellant, without hearing on notice to appellant, or other "probable cause" determination, violated his rights to Due Pro-

cess of Law. Once processing of appellant's reinstatement application, was suspended because of the mere existence of the complaint that appellant had practiced law while suspended, appellant suffered deprivation of an important right. Since the practice of law constitutes a "right" for purposes of constitutional analysis (Willner v. Committee on Character and Fitness, supra, 373 U.S. at 102, 83 S.Ct. at 1180), arbitrary denial of the means to perfect that right (access to the reinstatement process) is no less a denial than arbitrary withholding of the right itself. See, Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

To appreciate the gravity of the deprivation, it must be remembered that appellee received notice of the claim that appellant allegedly practiced law while suspended in July, 1980. By Appellate Divi-

sion order dated October 6, 1980 (just six days after the scheduled termination of appellant's prior suspension) appellant was permitted to file for reinstatement, and the Committee on Character and Fitness was authorized to report on the question, inter alia, of whether appellant had complied with the order of suspension. Rather than proceeding with its charge, as required by 22 NYCRR § 691.11(b) (with appellee being permitted to be heard in opposition, see 22 NYCRR § 691.11(d)), the Committee on Character and Fitness ceased its evaluation of appellant's reinstatement application upon appellee filing its sua sponte complaint (22 NYCRR § 691.4 (c)), in November, 1980, charging appellant had practiced law while suspended. Four to five months later, appellee applied to the Appellate Division for leave to institute disciplinary proceedings; and after leave was granted in April, 1981, it

was not until August 18, 1981 that its charges were served.

From November, 1980 - August, 1981, appellant was denied his right to pursue reinstatement. Yet, no opportunity was afforded appellant to be heard before being deprived of that right; even his request to appear before the Grievance Committee, before it moved for leave to serve formal charges, was denied.

Significantly, at least three other alternatives could have been pursued by the appellee. It could have: (1) contested appellant's reinstatement application before the Committee on Character and Fitness; (2) instituted a proceeding to punish appellant for contempt for engaging in the practice of law while suspended (N.Y. Judiciary Law § 90 (2) (6) (McKinneys 1983)); (3) instituted a criminal action against appellant, charging him with the misdemeanor of practicing law

while suspended (Judiciary Law § 486); see, e.g., Matter of Javitz, 100 A.D.2d 288, 473 N.Y.S.2d 797 (1st Dept. 1984).

Each of these three alternatives would have provided appellant with an opportunity to be heard with respect to the charge in a timely fashion, with the rights to pre-trial discovery and to appellate review on questions of law and fact and without unduly delaying his right to pursue reinstatement. Appellee's choice from among the alternatives can only be viewed as prosecutorial vindictiveness for Appellant's prior constitutional challenges to the attorney disciplinary process and an attempt to forestall, if not preclude, an adjudication of the challenge presented below and herein. Claims of such vindictiveness are of constitutional dimension. See, Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

By August 18, 1981 when the formal peti-

tion and charges were served, appellant had already been denied access to the reinstatement process for nine months, a punishment and suspension from the practice of law, unauthorized and exceeding that under the prior order of suspension, based solely upon untested accusation. Appellant was furnished with no opportunity to be heard in opposition to that suspension.

After formal charges were served, the unauthorized suspension continued, again without a hearing or "probable cause" determination -- for eight months until the hearing commenced, and, following submission in June of 1982 of this matter to the Special Referee, for an additional twenty-three months until May, 1984, when the matter was determined by the Appellate Division. It cannot be argued that the Special Referee's Report constituted a probable cause determination since the New

York Court of Appeals has only recently held that only the Appellate Division, and not the hearing officer, has authority to suspend an attorney. Matter of Nuey, 61 N.Y.2d 513, 474 N.Y.S.2d 714, 715 (1984).

Curiously, while speaking forcefully with respect to this precise situation in the case of a physician, here the New York Court of Appeals failed to respect appellant's constitutional rights. In Matter of Wooten v. Axelrod, 60 N.Y.2d 353, 361-2, 469 N.Y.S.2d 637, 641 (1983), the court stated:

> "The Commissioner's several successive orders have operated to extend the suspension to a period greater than one year. Surely, this is not the prompt hearing and determination of the issues to which the suspended licensee is constitutionally entitled...."

This Court has held that pre-hearing suspension without hearing is a violtion of due process in a wide variety of situations ranging from welfare benefits (Goldberg v. Kelly, supra), to school

suspensions (Goss v. Lopez, supra), to tenured teaching appointment (Perry v. Sindermann, supra) to replevin (Fuentes v. Shevin, supra); but see, Matthews v. Eldridge, supra. And it has applied that principle to license suspensions. Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (driver's license and vehicle registration). While a full-blown adversary hearing may not always be necessary to justify a pre-judgment suspension, some sufficiently reliable probable cause mechanism, with opportunity for the accused to present his side of the story, coupled with a prompt adversary hearing must be provided to satisfy due process. See, Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (harness horse trainer's license).

The final judgment of the New York Court of Appeals in the instant case finds no consonance with those rulings of this

Court. Here there has been: no "probable cause" or other pre-suspension determination affording appellant an opportunity to be heard; no reliable means to make a probable cause determination; and no effort to furnish either a prompt post-suspension hearing or a speedy determination. Rather, apparently content that appellant was suffering suspension without appellee being required to prove its case (or even "probable cause"), appellee selected the procedural avenue which would entail the most delayed determination. Cf. Klopfer v. State of North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Surely, the lesson of Mildner v. Gulotta, supra, and Gerzof v. Gulotta, supra, was that appellant had no alternative but to tolerate that pre-judgment suspension and delay and to challenge same, as he has within the disciplinary process and on appeal.

Subtracting the period of the disciplinary hearing (April 1, 1982 - June 25, 1982), appellant was denied a constitutionally protected right, to pursue his reinstatement to the Bar and resume the practice of law, for a period of thirty-nine months until the order or disbarment issued. Yet for thirty-nine months, that deprivation was imposed without a timely and meaningful hearing on the issues, in violation of due process of law as this Court has clearly and repeatedly explained and enforced that basic constitutional safeguard.

D. Appellant was denied due process of law because the inadequate notice of the charges against him coupled with denial of all disclosure, including exculpatory information, denial of a bill of particulars and denial and limitation of trial subpoenas impaired and impeded his ability to prepare adequately for trial and to con-

front or rebut the evidence against him. "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity must be furnished "...at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). As part of the opportunity to be heard, "...due process requires an opportunity to confront and cross-examine adverse witnesses." Golberg v. Kelly, supra, 397 U.S. at 269, 90 S.Ct. at 1021.

In this case appellant was denied a meaningful opportunity to be heard and to confront, cross-examine and rebut the witnesses against him, so crucial here because appellant was in the difficult position of having to prove a negative: that he did not engage in the practice of law while suspended therefrom.

Appellant's first response to the charges served on him was a dismissal motion on the ground, inter alia, that the petition failed to state a cause of action or alternatively, for a more definite statement (N.Y. Civ. Prac. Law and Rules 3024, McKinney 1974). (The charges are reproduced in the Appendix hereto, beginning at p. 93a, infra.) That motion was denied. (See, p. 75a, infra.) Thereafter appellant sought pre-hearing disclosure, but his requests and motion therefor were rejected. (See, p. 64a, infra.) He demanded a bill of particulars, but appellee's motion to vacate his demand was granted by the Appellate Division. (See, p. 58a, infra.) His demand and motion for exculpatory information contained in appellee's file (see, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 10 L.Ed.2d 215 (1963)) were rejected. His motion for a trial subpoena compelling appellee to pro-

duce exculpatory information and its report on which the Appellate Division granted leave to commence the disciplinary proceeding (a report which to date has been kept secret) was also denied. (See, p. 87a, infra.)

Thus, the disciplinary hearing below commenced without appellant knowing who appellee's "twelve to fifteen" witnesses would be or to what matters their testimony would relate. Appellant's ability to prepare to confront and cross-examine was further eroded when, on the first hearing day, appellee's counsel identified three witnesses he would call to testify, none of whom, as it eventuated were called.

This situation provided appellant neither "...adequate notice detailing the reasons...[nor] an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally". Goldberg v. Kelly,

supra, 397 U.S. at 267-8, 90 S.Ct. at 1020.

And the problems were compounded when the Appellate Division found appellant guilty of Charge Two, notwithstanding that no evidence had been offered at the hearing in support of that charge. Any "evidence" that the Appellate Division relied upon, then, was evidence which appellant was not permitted to confront, or even examine. Cf. Willner v. Committee on Character and Fitness, 373 U.S. 96, 105-6, 83 S.Ct. 1175, 1181, 101 L.Ed.2d 224 (1963); Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); see also, Matter of Torres v. Andrews, 33 A.D.2d 696, 306 N.Y.S.2d 189, 190-1 (2nd Dept. 1969) ["[I]n a trial for perjury, the record of the case in which it is alleged the perjury was committed is admissible in evidence *** [b]ut such record itself is insufficient for the trier of

facts to base a determination that the crime of perjury was committed...."]. Nor can the finding of guilt as to Charge Two, made in clear violation of appellant's due process rights to confront and rebut, be considered harmless error. The discipline imposed might well have been less severe without the finding of guilt on the second charge. See, Matter of Del Bello v. Westchester County Bar Assn., 19 N.Y.2d 466, 280 N.Y.S.2d 651 (1967), on remand, 28 A.D.2d 994, 283 N.Y.S.2d 303 (2nd Dept. 1967).

The due process safeguards of notice and oportunity to be heard are designed, in part, to minimize the risk of erroneous determinations. Another way in which the due process guarantee has been applied to minimize the risk of erroneous determinations regards the applicable standard of proof. See, Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 71 L.Ed.2d 599 (1982).

Appellant argued below that due process requires proof "beyond a reasonable doubt" in attorney disciplinary proceedings. The Special Referee found (with respect to Charge One) alternatively that guilt was established beyond a reasonable doubt (p. 42a, infra) and by clear and convincing proof (p. 40a, infra). The Appellate Division agreed "...with the special referee's sustaining the first charge of misconduct...", but gave no indication as to the standard of proof by which it deemed that charge established. With respect to Charge Two, as to which the Special Referee made no finding, the Appellate Division found appellant guilty, without specifying the standard of proof. In the absence of specific comment by that court it must be assumed that the standard employed was the "mere preponderance of the evidence" standard recently re-affirmed by the New York Court of Appeals. Matter of Capoccia, 59

N.Y.2d 549, 466 N.Y.S.2d 268 (1983). Although Capoccia was decided after this Court's decision in Santosky v. Kramer, supra, no mention was made of the latter case in the New York Court of Appeals decision. Following the Santosky analysis, however, it is clear that the "mere preponderance" standard is constitutionally deficient in attorney disciplinary cases. The private interests of the attorney subject to discipline are indeed substantial. See, e.g., Konigsberg v. State Bar of California, supra; Erdmann v. Stevens, 458 F.2d 1205 (2nd Cir. 1972), cert den, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972). The risk of error is great, especially, as here, where the charges are unspecific, disclosure and a bill of particulars disallowed, subpoenas denied and the attorney's rights to full notice and a meaningful opportunity to be heard denied. The risk of error is also compounded by

the severe limitation on the attorney's right to appeal from an adverse determination by the Appellate Division. See infra. The government interests involved in attorney disciplinary cases are protection of the public and maintenance of the public confidence in the legal system. As to the former, that, too, is a paramount concern in criminal actions and delinquency proceedings, as to both of which the constitution requires the "reasonable doubt" standard; obviously, then, that standard of proof is not incompatible with protection of the public. As to the second interest, a more error-free system, which treats lawyers with the same fundamental fairness it treats all other litigants and all other professionals subject to discipline, should engender more, not less, public confidence.

Thus, it appears that under Santosky, a higher standard of proof than the "mere

preponderance" standard applied below is required by due process and that a substantial constitutional question in this respect is presented herein.

Although this Court has held that the due process clause does require a state to provide litigants with appellate review, it has been careful to qualify that broad statement. See, Ohio ex rel Bryant v. Akron Metropolitan Park District, 281 U.S. 74 80, 50 S.Ct. 228, 230, 74 L.Ed. 710 (1930): "...the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance"; see also, Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972): "This Court has recognized that if a full and fair trial on the merits is provied, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review...". As has been

demonstrated, supra, it can hardly be said that the disciplinary hearing below provided a "full and fair trial on the merits" or that "due proces ha[d] already been accorded in the tribunal of first instance." In addition to the denial of all pre-hearing discovery, etc., appellant was denied the opportunity to present oral argument or otherwise to appear before the Appellate Division, the ultimate trier of fact and imposer of discipline. This element is of utmost importance here, since the Appellate Division has seen fit to make a finding of guilt as to Charge Two, a charge as to which no evidence was adduced at the hearing, and no right of confrontation was afforded appellant. A state which by its statutes has created a procedure which admits of such improprieties must be required to make available meaningful appellate review, as of right, so as to assure due process of law.

E. Appellant has been denied equal protection of the law. Every other litigant in the State of New York, civil, criminal, or administrative has a right of appeal on questions of law and fact from the determination of the first instance. As this Court stated in Lindsey v. Normet, supra, 405 U.S. at 77, 92 S.Ct. at 876, "when an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."

Among licensed professionals in New York, lawyers alone are denied the right to at least one review on questions of law and fact in license suspension or revocation proceedings.

Recently, this Court has stated: "...a law will survive [equal protection] scrutiny if the distinction it makes rationally furthers a legitimate state purpose." Zobel v. Williams, 457 U.S. 55, 102 S.Ct.

2309, 2313, 72 L.Ed.2d 672 (1982). This is the least stringent equal protection "test", applicable where no "suspect class" or "fundamental right" is involved. Even assuming, arguendo, that the right to pursue the practice of law is not deemed a fundamental right, the classification adopted by the New York legislature cannot withstand equal protection analysis.

It is difficult, if not impossible, to conceive of any legitimate state purpose which is in any way furthered by denying attorneys the same appellate rights as other litigants, particularly other professionals subject to discipline. Certainly the rationale of protection of the public is no more pressing in the case of miscreant attorneys than, say, physicians; nor does the denial of a right of appeal both on the law and the facts provide the public with greater protection. The rationale of preserving public confidence

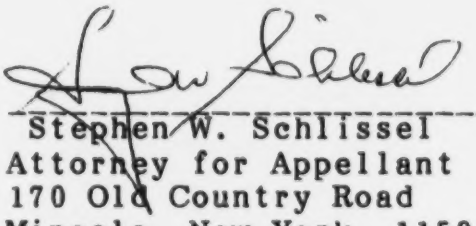
in the legal system is not served by this discrimination against attorneys; the disciplinary system is no more immune from error because it is made immune from review (except by permission or where the Court of Appeals determines that substantial constitutional issues are directly involved).

In fact, the danger of error in attorney disciplinary cases is more acute than with other professionals because the factfinder and disciplinary authority, the Appellate Division, does not itself hear the evidence, observe the witnesses and listen to argument of counsel. The public interest in error-free adjudication is disserved, to the detriment of attorneys alone, by virtue of the absence of a right to appeal on questions of fact and errors of law. Thus, this equal protection claim presents a substantial federal question.

CONCLUSION

For the reasons set forth herein, the Court should take jurisdiction of this appeal, direct the submission of briefs and schedule the case for oral argument. Alternatively, and pursuant to 28 U.S.C. §2103, the Court should treat this jurisdictional statement as a petition for a writ of certiorari and should grant the writ.

Respectfully submitted,



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DECISION OF THE COURT OF APPEALS

OF NEW YORK

DISMISSING APPEAL FROM ORDER OF

DISBARMENT

(entered September 18, 1984;
not yet reported)

At a Session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of September A.D. 1984.

HON. LAWRENCE H. COOKE

Mo. No. 769
In the Matter of :
Julius M. Gerzof, :
a suspended attorney. :

The Grievance Committee :
for the Tenth :
Judicial District, :

Respondent, :

Julius M. Gerzof, :

Appellant. :

Motion to dismiss the appeal granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

ORDER OF THE COURT OF APPEALS

OF NEW YORK

DISMISSING APPEAL FROM ORDER OF

DISBARMENT

(entered September 18, 1984)

At a Session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of September A.D. 1984.

HON. LAWRENCE H. COOKE

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In the Matter of :
Julius M. Gerzof, :
a suspended attorney. :

The Grievance Committee :
for the Tenth :
Judicial District, :

Respondent, :

Julius M. Gerzof, :

Appellant. :

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and

due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

/S/_____
Donald M. Sheraw
Clerk of the Court

OPINION OF THE APPELLATE DIVISION, SECOND DEPARTMENT GRANTING MOTION TO AFFIRM, DENYING CROSS-MOTION TO DISAFFIRM AND DISBARRING APPELLANT FROM THE PRACTICE OF LAW (dated May 29, 1984; 101 A.D.2d 451, 476 N.Y.S.2d 21 (1984))

SUPREME COURT:
APPELLATE DIVISION May 29, 1984
SECOND JUDICIAL DEPARTMENT

MOLLEN, P.J., TITONE, LAZER, MANGANO and O'CONNOR, JJ.

In the Matter of JULIUS M. GERZOF, a suspended attorney.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Petitioner;

JULIUS M. GERZOF,

Respondent.

Nos. 4736 and 4847

DISCIPLINARY proceeding instituted by the Grievance Committee for the Tenth Judicial District. By order of this court

dated December 9, 1981, this matter was referred to Honorable DANIEL G. ALBERT, a retired Justice of the Supreme Court, as special referee to hear and report.

Frank A. Finnerty, Jr., Mineola, N.Y. (Louis J. Profera of counsel), for petitioner.

Ruskin, Schlissel, Moscou & Evans, P.C., Mineola, N.Y. (Stephen W. Schlissel of counsel), for respondent.

P E R C U R I A M. Respondent was admitted to the practice of law by this court on May 6, 1936. Following the conclusion of a previous disciplinary proceeding, the respondent was suspended from the practice of law for a period of three years (Matter of Gerzof, 45 AD2d 450).

In this proceeding to discipline respondent for professional misconduct, petitioner moves, inter alia, to confirm the report of the special referee and the respondent cross-moves, inter alia, to confirm in part and disaffirm in part said report.

The special referee sustained the first charge of professional misconduct which alleged that respondent engaged in the practice of law in violation of the rules of this court and in violation of sections 484 and 486 of the Judiciary Law, to wit, practicing law while under suspension. The special referee made no finding as to a second charge alleging that respondent made false statements to this court's Committee on Character and Fitness regarding his compliance with the rules of this court concerning the conduct of a suspended attorney.

After reviewing all of the evidence we are in agreement with the special referee's sustaining the first charge of misconduct and we hereby find respondent guilty of the second charge.

Hearings were held over 19 separate days and the record of those proceedings comprised approximately 3,000 pages. The

petitioner presented eight witnesses and the respondent presented 10 witnesses. In addition, 37 exhibits were received on behalf of the petitioner and 27 exhibits on behalf of the respondent. The record reveals that after the respondent was suspended from the practice of law he continued to practice law through another attorney whom he had hired, that he continued to provide legal services for his former law clients and solicited new clients, and that he received compensation for his legal services. We note that the special referee conducted a fair hearing and prepared a clear and comprehensive report. Respondent is guilty of the misconduct outlined above. Petitioner's motion is granted and respondent's cross motion is denied.

In determining an appropriate measure of discipline we have taken into consideration the serious nature of this misconduct

as well as the fact that respondent was suspended from the practice of law for his previous professional misconduct. Accordingly, the respondent should be, and hereby is, disbarred and the clerk of this court is directed to strike respondent's name from the roll of attorneys and counselors at law forthwith.

MOLLEN, P.J., TITONE, LAZER, MANGANO and O'CONNOR, JJ., concur.

ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT GRANTING THE MOTION TO AFFIRM, DENYING CROSS-MOTION TO DISAFFIRM AND DISBARRING APPELLANT FROM THE PRACTICE OF LAW (entered May 29, 1984)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 29, 1984.

HON. MILTON MOLLEN, Presiding Justice

HON. VITO J. TITONE,)
HON. LEON D. LAZER,) Associate Justices
HON. GUY J. MANGANO,)
HON. FRANK D. O'CONNOR)

In the Matter of Julius M. Gerzof, a suspended attorney.	:	
Grievance Committee for the Tenth Judicial District, Petitioner;	:	Order of Disbarment.
Julius M. Gerzof, Respondent.	:	

A disciplinary proceeding having been instituted in this court upon the petition of the Grievance Committee for the Tenth Judicial District in respect to Julius M. Gerzof, a suspended attorney and counselor at law (original admitted to practice by this court on May 6, 1936); the petition praying that the respondent be disciplined for professional misconduct upon the charges therein set forth; and the respondent having filed an answer to the petition; and this court by an order dated December 9, 1981, inter alia, having referred the issues raised by the petition and the answer to Hon. DANIEL G. ALBERT, a retired Justice of the Supreme Court, as Special Referee, for an expeditious hearing and to report together with his recommendations; and the said referee having held a hearing filed his report with this court on January 11, 1983, together with a transcript of the hearing

and the exhibits; and the petitioner having moved, by a notice of motion, dated January 26, 1983, inter alia, to confirm the report of the Special Referee and the respondent having cross-moved by a notice of cross-motion, dated June 9, 1983, inter alia, to confirm in part and to disaffirm in part the said report;

Now, upon the said petition, verified August 18, 1981; the said answer, dated September 25, 1981; the report, the transcript; the exhibits; the said notice of motion and the affidavit of Louis J. Profera in support of the petitioner's motion; the said notice of cross-motion, the affidavits of Stephen W. Schlissel and Julius M. Gerzof and the exhibits annexed thereto in support of respondent's cross motion; and upon all the papers filed herein; and Louis J. Profera, Esq., having appeared of counsel for the petitioner and Stephen W. Schlissel, Esq.,

having appeared of counsel for the respondent, due deliberation having been had thereon; and upon the OPINION PER CURIAM herein, dated May 29, 1984, wherein the respondent is found guilty of the misconduct outlined therein, heretofore filed and made a part hereof, it is unanimously

ORDERED that the petitioner's motion is hereby granted and the respondent's cross motion is hereby denied, and it is further

ORDERED that, effective May 29, 1984, the said respondent Julius M. Gerzof, be and he hereby is disbarred from the practice of the law, and the name of Julius M. Gerzof is hereby directed to be struck from the Roll of Attorneys and Counselors at Law, and it is further

ORDERED and DIRECTED that the respondent Julius M. Gerzof shall continue to comply with this Court's rules governing the conduct of disbarred, suspended and resigned attorneys - a copy of such rules being

annexed hereto and made a part hereof, and it is further

ORDERED that, pursuant to statute (Judiciary Law, § 90), the said Julius M. Gerzof be and he hereby is commanded to continue to desist and refrain: (1) from practicing law in any form, either as principal or as agent, clerk or employee of another; (2) from appearing as an attorney or counselor at law before any judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor at law.

Enter:

/s/ IRVING N. SELKIN

Clerk of the Appellate Division.

REPORT OF THE SPECIAL REFEREE

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------X

IN THE MATTER OF THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Petitioner,

-against-

JULIUS M. GERZOF,
A Suspended Attorney,

Respondent.

----------X

This proceeding was referred to me, a retired Supreme Court Justice, by order of the Appellate Division of the State of New York, Second Department, dated December 9, 1981, to hear and report on the issues involved in a disciplinary proceeding brought on by the petitioner, the Grievance Committee for the Tenth Judicial District against the respondent, Julius M. Gerzof, an attorney and counselor-at-law. Said order further directed that I make

recommendations on my findings.

Respondent herein is being charged under two specific charges of misconduct by the petitioner, to wit, that the respondent has engaged in the practice of law while subject to an order of suspension effective October 1, 1977, and that based on the aforesaid allegations, respondent perjured himself by failing to disclose that he had practiced law while suspended.

This proceeding was a protracted one spanning numerous hearing days. The stenographic transcript comprises more than 3,000 pages with numerous exhibits and did indeed contain a "cast of characters" as referred to by respondent's counsel in his post-hearing memorandum of law.

At the very start of the hearing in this proceeding, and before any witnesses testified, respondent's attorney made a number of motions requesting a dismissal of the petition, all of which were based princi-

pally upon the proposition that the constitutional rights of the respondent were violated and were not observed in accordance with the provisions of the First Amendment of the constitution covering free speech and the right to a hearing; and that the very practice and procedure of the disciplinary proceedings which are followed in this state are unconstitutional and are not protective of the respondent's rights thereunder.

In essence, every one of these motions and applications had previously been made before the Appellate Division or other appellate courts, including a proceeding instituted by the respondent before the United States District Court; and all of which applications and appeals were decided against the respondent.

Attacks similar to these have been made over a period of years in disciplinary proceedings of attorneys before our courts

and, time and again, the practice now followed in disciplining the attorneys at law who are licensed to practice before our courts have been sustained as constitutional and proper.

Without burdening the record with a plethora of such cases over the years, I believe it is sufficient to call attention to a very recent decision that was made by the United States Supreme Court and appeared in the New York Law Journal on June 22, 1982 which laid to rest, in my opinion, any questions of unconstitutionally pertaining to our present practice in disciplining lawyers in this state, wherever and whenever it is found necessary and proper to do so by the proper authority.

The case I refer to is that of Middlesex County Ethics Committee v. Garden State Bar Association, in which Chief Justice Warren Burger, writing for a unanimous court, stated in substance the disapproval

of that court of the "intrusion" of Federal courts in state disciplinary proceedings against lawyers. The unanimous decision enhances the power of state courts and bar associations over charges of unethical conduct. Chief Justice Burger said that Federal courts should not get involved in state disciplinary proceedings "so long as there is no showing of bad faith, harassment or some other extraordinary circumstance." The Chief Justice further cited a "strong Federal policy" against Federal interference in pending state disciplinary proceedings. Upon making the numerous motions before me at the outset of the hearing in this proceeding, I denied all such motions principally based on the fact that motions of the identical nature had already been made before the Appellate Division, the Court of Appeals and the Federal courts, all of which had been denied, and I indicated

that I did not intend to sit as an appellate court in differing with decisions that had already been made by the higher courts.

We now have this additional decision of the Supreme Court of the United States, the contents of which speaks for itself.

There is one other issue which I believe should be laid to rest before dealing with the evidence in the instant proceeding; and that is the insistence on the part of respondent's attorney that this proceeding was a criminal proceeding and that in order to make a finding against the respondent the petitioner must prove its case by evidence beyond a reasonable doubt, rather than by a fair preponderance of the credible evidence. Thereupon, although I disagreed with this contention, the respondent's attorney spent a substantial part of his post-trial brief expounding this theory and proceeding on the

basis that this was a criminal prosecution and, hence, rather than identify the moving party as the "petitioner", as the "prosecutor", and constantly referred to the proceeding as a prosecution.

I do not believe this to be the law nor do I adopt it as such. However, it happens to be immaterial in this instance because the findings which I will hereinafter set forth are based upon proof which I consider to be beyond a reasonable doubt.

As hereinbefore noted, the essence of petitioner's charges is that respondent practiced law while under an order of suspension.

The evidence indicates that an original order of suspension had been made by the Appellate Division in September of 1974, but the effective date thereof was postponed for practically three years and did not become effective until October 1,

1977; the delay having been due to all of the motions and applications to which I referred above that the respondent had brought on in the Appellate Division and other courts; and all of which had been decided against him. Accordingly, the effective date which we are to consider is that of October 1, 1977.

To establish the charge against respondent of violating the order of suspension, petitioner called a series of witnesses including the lawyer who purportedly took over respondent's law practice during the suspension period (Melvyn Hacker), one Joseph La Bella, Jr., a clerk purportedly in Hacker's employ, three secretaries, all of whom had been previously employed by respondent, but who purportedly became employed by Hacker, they being Christine Roche, Patricia Faherty, and Martha J. Mackasek, and a person for whom respondent allegedly performed legal services, one

Joseph La Bella, Sr., the father of the clerk of the same name.

Culling the important aspects from the aforesaid testimony, the credible evidence overwhelmingly established that respondent practiced law in violation of the order of suspension.

The evidence established that prior to his order of suspension respondent owned the building and property located at 71 North Main Street, Freeport, New York and that he continues to own it to date. Prior to his suspension from the practice of law, respondent maintained his offices at said address. Shortly before his suspension became effective on October 1st of 1977, respondent hired Hacker as an attorney in his then practice. Thereafter, Hacker purportedly assumed respondent's practice during the period of respondent's suspension and hired La Bella as a law clerk in the spring of 1978.

The evidence adduced at the hearing establishes clearly that Hacker was merely a front for respondent in carrying on his practice. Significantly, the record showed that respondent carried on a substantial commercial and real estate practice with in excess of 100 active legal files. Respondent's assertion that respondent entrusted this substantial practice to Hacker, whose experience consisted largely of defending prostitutes in Queens County, strains one's credulity. The testimony of the law clerk La Bella and others showed the contempt in which respondent held Hacker and the utter lack of respect respondent had for Hacker's legal ability. This aspect of La Bella's testimony is fully credited by me and was clearly borne out by other witnesses who testified.

Returning to the issue of the alleged transfer of respondent's practice to

Hacker, the record failed to show how Hacker, who had meager assets approximating $2,000.00, could be in any position to pay respondent the sum of $2,000.00 as monthly rent as well as pay the secretarial help, the law clerk and other substantial expenses connect with running a law office. The inescapable conclusion to be drawn from the foregoing is that he was not in any such position and the evidence showed that respondent paid many of the bills of the office.

Damaging testimony elicited against respondent came from Joseph La Bella, who was purportedly employed as a law clerk for Hacker from about April, 1978 through approximately February, 1979. The thrust of La Bella's testimony was that for the period of time he was employed at the suite of offices at 71 North Main Street, Freeport, New York, respondent actively practiced law using Hacker as a "front".

Indeed, La Bella testified, and it was not controverted, that early in his employment, respondent's son, Richard Gerzof, told him that Hacker was not to be trusted and that he (La Bella) would be taking his orders from respondent. La Bella did indeed testify that he took his instructions and directions from respondent.

La Bella further testified to his own observations in the office which support a finding that respondent practiced law. In this regard, he testified to observing respondent dictating, reviewing, and correcting papers which were prepared for Hacker's signature, who often did not even read them. La Bella particularly singled out respondent's work in the Boccard appeal, wherein among others, he closely worked with respondent in the preparation and research of the brief in the library and La Bella observed the material being dictated to Martha Mackasek, a secretary

in the office, by respondent.

La Bella also testified that respondent performed legal services for his father in the nature of preparing a lease for La Bella, Sr. in connection with the latter's business. The witness testified that he personally observed respondent prepare the lease.

Despite a rather extensive, probing and often intense cross-examination, La Bella's testimony concerning respondent's activity is credited by me. I find that to a large degree, La Bella's testimony was corroborated by other testimony adduced at the hearing, and this corroboration certainly minimized the flaws in La Bella's character as a controlling factor. Every statement of consequence of La Bella was largely substantiated by former employees of respondent. In this vein, I have placed great weight on the testimony of Martha Mackasek, who was employed as a

legal secretary at the offices from May, 1971 through May of 1980, and who would be expected to be favorable to respondent, as well as the testimony of La Bella, Sr. and Melvyn Hacker himself.

Ms. Mackasek testified that although she was nominally employed by Hacker, subsequent to respondent's suspension, she received cash payments from respondent, in addition to the respondent purchasing Ms. Mackasek a television set and sometimes paying her rent. More importantly, she buttressed La Bella's testimony with regard to respondent dictating the contents of legal documents of litigated matters on behalf of Hacker. In particular, referring to the Boccard matter, this witness supported La Bella's version that respondent did indeed dictate the contents of the brief to her and that Hacker played no role whatsoever in the preparation thereof. Ms. Mackasek also related that re-

spondent discussed matters with Hacker's "clients" and handled their complaints relative thereto.

At this point it is also worthy of note that although the Gerzof office had a front entrance at 71 North Main Street in Freeport, New York, which was open at all times to anyone coming into the office, one floor from the street floor, and in which a receptionist greeted any caller to the office, Gerzof also maintained an entrance to the rear of the office which was entered by a staircase from the parking lot of the building directly into his office; also that his personal office was the closest to the rear entrance with his son Richard (not an attorney) also having an office directly across from the respondent, and that friends and former clients were constantly using the rear staircase and coming directly into the Gerzof office and discussing matters with him without

even the receptionist or any of the others knowing about it.

The witness La Bella, Jr. testified to this practice, as well as several of the female witnesses who were formerly in Gerzof's employ, and now presumably employed by Hacker.

Joseph La Bella, Sr. also buttressed La Bella's testimony with respect to respondent preparing a lease for him after he had given to respondent the requirements therefor. This witness testified that he had discussions with respondent relative to the details of the lease and the matters to be incorporated therein and that respondent prepared the lease consistent with the matter discussed.

Melvyn Hacker also testified herein and through his appearance on the witness stand provided ample corroboration for this Court's conclusion that respondent acted through Hacker. This witness, who

had a difficult time scheduling his appearance because of medical appointments, had an even more difficult time recalling his efforts and work product when he purportedly took over respondent's practice. Time and time again, this witness was evasive as to respondent's role in the offices and he hedged on many of his answers to pointed inquiries as to respondent's participation in legal matters, as is clear from a reading of the record.

After only a few moments of listening to this witness on the witness stand, it was more than obvious to me that Melvyn Hacker was a weak, sick, pitiful and forlorn person -broken in health, both physically and mentally, he made a perfect candidate for a strong willed individual like the respondent herein, to be used and manipulated and completely controlled for the purpose for which the respondent used him throughout the melodrama that started to

unfold in the Gerzof office on October 1, 1977 at 71 North Main Street in Freeport, New York.

Here we have in the respondent an attorney who was a seasoned practitioner, principally in the practice of commercial law, an ambitious, energetic and strong personality about to become suspended from his law practice, and who needed just such an individual as Hacker -irresponsible as a lawyer; inexperienced in any substantial area of the law except to defend prostitutes in the criminal courts of the City of New York, and completely irresponsible financially as well, who obviously was hand picked and chosen to take over an entire suite of offices with a substantial payroll to meet each week and a rental of $2,000.00 per month to be paid to the respondent; and never having previously maintained a rented office on his own, and the office to be taken over containing a

substantial commercial law practice of well over 100 cases, some in the course of litigation and appeals; and, according to the respondent's story, we are to believe that he would have nothing to do with his existing law practice until the three year suspension period would come to an end. Hacker was to take over in toto.

When going through the motions of making a lease with Hacker calling for a payment of $2,000.00 per month as rental, respondent knew Hacker's weaknesses, both financially and otherwise; hence, it is easy to understand why he permitted Hacker to fall behind, allegedly, in his payments of rent to the tune of $12,000.00, and did nothing about it; the act nevertheless continued; and when finally Hacker used escrow funds illegally entrusted to him in the sum of $50,000.00 for his own purposes, with respondent claiming he was unaware of it, and after Hacker was dis-

barred from the practice of law, respondent nevertheless gave Hacker a lease for other space in the adjoining building which he owned at 67 Main Street in Freeport, New York.

Why, might we ask, would a strong-willed individual like respondent be so charitable to a broken and discredited man like Hacker if it were not for the fact that he needed him to stand up for him in the thoroughly unbelievable story in order to help to get him out of the unwholesome mess he now finds himself in, and which respondent knew he would have to face.

Long before Hacker took the witness stand I heard testimony from several of Gerzof's former employees, now presumably in Hacker's employ, apply the term "mental case" to Hacker, only to be confirmed before me when I saw and heard Hacker testify.

Indeed there was some testimony that

Hacker and the respondent were constantly at odds with one another, with the respondent applying epithets against Hacker, belittling him in the presence of other employees, and that they had even come to blows on occasion, but there was no one who actually saw a blow struck between these two men. There was testimony that at one time there was a commotion in the hallway and when the door was opened they found Hacker laying on the floor with Gerzof standing over him.

I also heard testimony from two other former employees at 71 North Main Street, Pat Faherty and Chris Roche. The latter's testimony contributed little to the issues involved; and the former's testimony I find to be unworthy of belief, consisting principally of denials and lack of any knowledge of office matters during her brief tenure in that office. This witness, upon being called to the witness

stand, insisted on reading a statement instead of testifying which, of course, I refused to permit. When she finally did submit to questioning she answered many of petitioner's questions before they were asked, all with denials and all punctuated with her desire to "black out completely" everything that happened in that office; not being able to remember whether she worked there two months, six months or more or less.

For side effects, we also have tape recordings taken from time to time of alleged conversations between the witness Joseph La Bella, Jr. and the respondent. There is testimony that some recordings were taken in various parts of the office, some with the knowledge of La Bella, some without his knowledge; some in the front seat of an automobile while parked in the parking lot in the rear of the building at 71 Main Street, some were allegedly

scripted by the respondent with the direction of La Bella, Jr. under threats that he would hinder his admission to the Bar unless he did as directed, to read into the recording device.

All in all, the evidence covering the alleged recordings is so botched with contradictions and self-serving declarations by respondent, that I give no credence or weight to any of the recordings.

Respondent's entire attack on La Bella, Jr.'s testimony is virtually directed at his credibility. The major point, in my opinion, overlooked by counsel for the respondent in this approach, is that most of the salient points which established La Bella, Jr.'s accusations about respondent's actions during the suspension period are corroborated by witnesses who would be most inclined to favor and to help respondent wherever and whenever possible, rather than to injure him.

One very potent example as to who is telling the truth here is the story, as heretofore mentioned, covering the drawing of the Boccard appeal briefs before the Appellate Division; including the first brief and subsequently the reply brief. I am firmly convinced beyond any doubt whatsoever, that Gerzof worked on them, drew them to fruition, and directed that Hacker's name be placed on them before they were filed with the Appellate Division. I completely disbelieve any of the testimony to the contrary. This is only one example of the blatant manner by which respondent had planned to and attempted to hoodwink the Court to think otherwise.

This entire drama that started unfolding at Gerzof's office on October 1, 1977 is so uncanny that it is worthy of being compared to a melodrama which could be written by a Hollywood scenario writer. Even the cast of characters who took the wit-

ness stand, other than the character witnesses, could not have been better chosen.

I believe it important to comment on the witnesses who came forward to testify on behalf of respondent in the form of character testimony. There is no doubt that the respondent produced a very impressive group of character witnesses, but each witness, personally known to me it developed, could only testify to respondent's ability as a lawyer and that they believed him to be a man of honesty and integrity in the practice of law. The difficulty with this kind of testimony is that not one of these character witnesses had any personal knowledge as to whether or not the respondent practiced law in violation of the suspension order after October 1, 1977. Under these circumstances, the impact of such testimony is clearly unimpressive and cannot be given great weight considering the principal

issue in this proceeding as to whether or not the respondent did practice law contrary to the order of suspension. Obviously the fact that honorable members of the Bar, such as those who testified as character witnesses, have had satisfactory dealings or experiences with the respondent in the past does not add or detract from the issue as to whether or not respondent violated the order of suspension.

Respondent's counsel in the post-trial brief correctly asserts that one of the controlling issues involved herein is "what acts constitute the unauthorized practice of law."

In the within proceeding the credible and believable testimony in evidence all points to only one conclusion, namely, that respondent actively participated in the practice of law in that he continued to work on legal matters in his office, counseled clients, prepared legal docu-

ments, and carried on his substantial commercial practice, using Hacker merely as a figurehead and as a front. The evidence further clearly showed that respondent embarked on a deliberate course of conduct to circumvent the order of suspension and that he had no intention of removing himself from the practice of law.

It must be noted that respondent took the witness stand and emphatically denied the gravamen of charge one, that he practiced law in any fashion. The denials were wide ranging and went to every facet of petitioner's proof, denying the substance of the La Bellas' testimony and that of Martha Mackasek and Melvyn Hacker. I place no credence whatsoever in respondent's repeated denials of what I find to be clear and convincing credible evidence that respondent practiced law at 71 North Main Street, Freeport, New York, during his period of suspension while using

Hacker as his dupe.

I return for a moment to the issue raised by respondent concerning the character of proof necessary to establish a finding in this proceeding, namely, whether it should be by a fair preponderance of the credible evidence or beyond a reasonable doubt.

In this regard, I note that respondent has persistently likened the within proceeding to a quasi-criminal proceeding and urged that the "guilt beyond a reasonable doubt" standard should be applied herein. I return to this issue merely to indicate that the New York State Court of Appeals, only recently, has reaffirmed the principle that disciplinary proceedings are not criminal proceedings. The Court stated: "Disciplinary proceedings against an attorney for professional misconduct have consistently been held not to be criminal proceedings but rather are

those which serve to protect the court and society from the practice of law by persons who fail to maintain the necessary standard of integrity and probity (citations omitted)". (Matter of Anonymous Attorneys (Bar Association of Erir County), 41 NY 2d 506, 509). It has also been held that questions in disciplinary proceedings are to be determined upon a fair preponderance and the reasonable inferences to be drawn therefrom (see Matter of Gunderson (Committee on Professional Standards, Third Judicial Department), 75 AD 2d 706). I find, however, that not only has petitioner satisfied the lesser standard of proof with respect to Charge One as set forth in Gunderson, supra, but also that petitioner has established beyond any reasonable doubt that respondent has practiced law in violation of the order of suspension.

I therefore conclude that the petitioner

has established Charge One as set forth in the Petition, and I so find beyond any reasonable doubt; although as stated a fair preponderance of the credible evidence would have been sufficient.

Turning to Charge Two, petitioner has alleged that respondent has issued materially false statements in his application for reinstatement to this Court and in various affidavits in support of motions before the Appellate Division. However, the specific documents that petitioner refers to in Charge Two were not introduced at the hearing and thus I am unable to make any findings relative to allegedly false statements contained therein. Since the Appellate Division has among its files the papers and documents referred to by the petitioner wherein petitioner alleges that the respondent swore falsely in representing to it upon his application for reinstatment that he was

not practicising [sic] law during the period of the suspension which started on October 1, 1977, I must necessarily refer this determination to the learned justices of the Appellate Division, and cannot make any finding thereon at this time.

In referring this proceeding to me for a full hearing, the Appellate Division also requested that I make recommendations based upon my findings.

This disciplinary proceeding was not a pleasant one for me, nor, for that matter, in any disciplinary proceeding. However, I have heard all of the testimony and evidence submitted by the petitioner and the respondent and have given a great deal of time and effort in arriving at my conclusions.

Since the respondent has been suspended for three years in a prior proceeding on offenses previously committed and apparently so drastice as to warrant a three

year suspension, I feel that I have no other choice, much as I regret it, than to recommend that respondent be disbarred from the further practice of law in the State of New York. The intentional flouting and circumvention of the order of suspension clearly warrant such a conclusion.

I have accordingly set forth what I consider to be the salient factors in this proceeding regarding the acts complained of and the issues involved in the petition upon which this proceeding was instituted, having in mind, of course, that it is clearly and solely within the province of the learned justices of the Appellate Division, Second Department, to decide in their infinite wisdom, what disposition should be made for the future in regard to the practice of law by Julius M. Gerzof, the respondent herein.

Respectfully submitted,

Daniel G. Albert, Special Referee
Dated: December 29, 1982

ORDER AND DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT DENYING MOTION TO DISMISS (entered May 11, 1984; unpublished)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 11, 1984.

HON. MILTON MOLLEN, Presiding Justice

HON. VITO J. TITONE,)
HON. LEON D. LAZER,) (NOT TO BE PUBLISHED)

HON. GUY J. MANGANO,)
HON. FRANK D. O'CONNOR.) Associate Justices

In the Matter of :
Julius M. Gerzof, :
a suspended attorney. :

Grievance Committee :
for the Tenth :
Judicial District, :

Petitioner; :

Julius M. Gerzof, :

Respondent. :

Order on Motion

In the above entitled disciplinary proceeding, the above named Julius M. Gerzof, respondent, having moved, by a notice of motion, dated April 16, 1984, (1) to dismiss the said proceeding now pending against him and (2) to direct that he be reinstated to the practice of law forthwith;

Now, upon the said notice of motion and the affidavits of Stephen W. Schlissel and Julius M. Gerzof in support of the said motion; the affidavit of Louis J. Profera in opposition thereto; and the affidavit of Stephen W. Schlissel in reply thereto and in further support of respondent's said motion, and the motion having been submitted by Stephen W. Schlissel in reply thereto and in further support of respondent's said motion, and the motion having been submitted by Stephen W. Schlissel, Esq., of counsel for

the respondent and submitted by Louis J. Profera, Esq., of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED, that the said motion is hereby denied.

Enter:

/s/ IRVING N. SELKIN

Clerk of the Appellate Division.

DECISION SLIP

No. 3395

In the Matter of Julius M. Gerzof, a suspended attorney,

The Grievance Committee for the Tenth Judicial District, petitioner;

Julius M. Gerzof, respondent.

Motion by respondent (1) to dismiss the instant disciplinary proceeding now pending against the respondent and (2) to direct that said respondent be reinstated to practice of law forthwith.

Motion denied.

MOLLEN, P.J., TITONE, LAZER, MANGANO &

O'CONNOR, J.J., concur

ORDER AND DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT DENYING MOTION TO REMIT TO THE SPECIAL REFEREE TO DESIGNATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

(entered May 20, 1983; unpublished)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 20, 1983.

HON. MILTON MOLLEN, Presiding Justice

HON. VINCENT D. DAMIANI,)
HON. VITO J. TITONE,)
HON. LEON D. LAZER,)
HON. FRANK D. O'CONNOR) Associate Justices

(NOT TO BE PUBLISHED)

In the Matter of :
Julius M. Gerzof, :
a suspended attorney. :

Grievance Committee : Order on
for the Tenth : Motion
Judicial District, :

Petitioner; :

Julius M. Gerzof, :

Respondent. :

In the above disciplinary proceeding, this court, by an order dated December 9, 1981, inter alia, having referred the issues raised by the petition and the answer herein to Hon. DANIEL G. ALBERT, a retired Justice of the Supreme Court, as Special Referee, for an expeditious hearing and to report together with his recommendations; thereafter, the said Special Referee having held a hearing and having filed his report with this court on January 11, 1983, together with a transcript of the hearing and the exhibits; and the respondent having moved, by an order to show cause, dated February 11, 1983, to remit the Special Referee's report to the Special Referee for the purpose of making findings of fact and conclusions of law and for other relief and having made a request to argue the said motion orally;

Now, upon the said order to show cause, the affidavits of Stephen W. Schlissel,

and Julius M. Gerzof and the exhibits annexed thereto in support of the said motion; the affidavit of Louis J. Profera and the exhibits annexed thereto in opposition to the said motion; the reply affidavits of Stephen W. Schlissel and Julius M. Gerzof and the exhibits annexed thereto; and upon all the papers filed herein; and the motion having been submitted by Stephen W. Schlissel, Esq., of counsel for the respondent and submitted by Louis J. Profera, Esq., of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDRED, that the said motion is hereby denied, and it is further

ORDERED, that the respondent's request to argue the motion orally is hereby denied.

Enter:

/s/ IRVING N. SELKIN

Clerk of the Appellate Division.

DECISION SLIP

No. 1492

In the Matter of Julius M. Gerzof, a suspended attorney.

THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, petitioner;

JULIUS M. GERZOF, respondent.

Motion by respondent to remit the Special Referee's report to the Special Referee for the purpose of making findings of fact and conclusions of law; and for other relief;

Motion denied.

Respondent's request to argue the motion orally, denied.

MOLLEN, P.J., DAMIANI, TITONE, LAZER and O'CONNOR, J.J., concur.

ORAL DECISION OF THE SPECIAL REFEREE DENYING MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM DIRECTED TO APPELLEE THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT

(Reprinted from transcript of the disciplinary hearings below, pp. 119-130, as indicated, April 2, 1982).

SUPREME COURT: NASSAU COUNTY [sic]

In the Matter of :
The Grievance Committee :
of the Tenth :
Judicial District, :

Petitioner, :

-against-

Julius M. Gerzof, :
(A Suspended Attorney) :

Respondent. :

B E F O R E:

HON. DANIEL G. ALBERT,

Special Referee

* * *

THE REFEREE: * * *

In reading the papers, I am going to deny the motion because I feel that this is substantially what was required or what was requested when the application was made to the Appellate Division in the first instance to permit discovery and inspection in this proceeding, and that was denied. [Tr. 119-120]

* * *

THE REFEREE: You are asking me to issue a subpoena to discover the same grounds, practically, to all intents and purposes, of the application that was made before the Appellate Division before this hearing was directed, and which they already denied. So what you are in effect asking me to do is to give you the relief which the Appellate Division denied to you. And I cannot sit here as appellate tribunal over that of the Appellate Division. [Tr. 127]

* * *

THE REFEREE: Whatever they are going to produce as evidence is certainly going to be in open court, and whatever is produced by them will be opened to you for inspection to your heart's content. And if you feel that you need any additional witnesses because you were caught by surprise, if you plead surprise over anything I will give you every opportunity available to be able to bring forth whatever other evidence you feel you would have brought forth if you had known what comes out during the course of trial.

Now, that is fair enough. But I cannot sit here and grant you a subpoena duces tecum by way of a motion which you have made, on material which substantially, certainly, covers the application you made before the Appellate Division for discovery and inspection, which was denied to you. I just can't do it. And you understand that, I am sure. [Tr. 128]

* * *

THE REFEREE: In other words, you would like to have a list of everybody that they spoke to in their investigation.

* * *

That is not permissible under any proceeding.

* * *

Substantially, that is what you are saying. Maybe they spoke to somebody who was of no avail to them. You would like to know who it is. Maybe you will call them. That is what you are saying. [Tr. 129]

THE REFEREE: You ask him on cross-examination: Have you made a written statement to this effect, and given a written statement? Where is it? They will produce it, if they have one. [Tr. 130]

THE REFEREE: I feel I have no choice but to deny your motion. [Tr. 130]

ORDER AND DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT VACATING DEMAND FOR BILL OF PARTICULARS

(entered May 14, 1982; unpublished)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 14, 1982.

HON. MILTON MOLLEN, Presiding Justice

HON. VINCENT D. DAMIANI,) (NOT TO BE PUBLISHED)
HON. LEON D. LAZER,)
HON. GUY J. MANGANO,) Associate Justices
HON. FRANK D. O'CONNOR)

In the Matter of Julius M. Gerzof, a suspended attorney.	:	
Grievance Committee for the Tenth Judicial District,	:	Order on Motion
Petitioner;	:	
Julius M. Gerzof,	:	
Respondent.	:	

In the above entitled disciplinary proceeding, the above named Grievance Committee for the Tenth Judicial District, peti-

tioner, having moved, by a notice of motion dated March 12, 1982, to vacate a demand for a bill of particulars;

Now, upon the said notice of motion and the affidavit of Louis J. Profera in support of the said motion and the affidavit of Stephen W. Schlissel and the exhibits annexed thereto in opposition to the said motion; and the motion having been submitted by Louis J. Profera, Esq., of counsel for the petitioner and submitted by Stephen W. Schlissel, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED, that the said motion is hereby granted and the demand for a bill of particulars vacated.

Enter:

/s/ IRVING N. SELKIN

Clerk of the Appellate Division.

DECISION SLIP

No. 2192
In the Matter of Julius M. Gerzof, a suspended attorney

Grievance Committee for the Tenth Judicial District, Petitioner,

Julius M. Gerzof, Respondent.

Motion by petitioner to vacate a demand by respondent for a bill of particulars.

Motion granted and demand for bill of particulars, vacated.

MOLLEN, P.J., DAMIANI, LAZER, MANGANO & O'CONNOR, J.J., concur

ORDER AND DECISION OF THE COURT OF APPEALS DISMISSING APPEAL FROM ORDER DENYING PRE-HEARING DISCLOSURE (entered April 1, 1982)

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of April A.D. 1982

P R E S E N T,

HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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2 Mo. No. 357
In the Matter of Julius M. Gerzof, a suspended attorney.

The Grievance Committee for the Tenth Judicial District,
Respondent,
Julius M. Gerzof,
Appellant.

A motion for leave to appeal and for a stay in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution, and is not within CPLR 5602(a)(2).

/s/ JOSEPH W. BELLACOSA
Clerk of the Court

Decision Slip

---

2 Mo. No. 357
In the Matter of Julius M. Gerzof, a suspended attorney.

The Grievance Committee for the Tenth Judicial District,
Respondent,
Julius M. Gerzof,
Appellant.

Motion for leave to appeal and for a stay dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution, and is not within CPLR 5602(a)(2).

ORDER AND DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT DENYING MOTION FOR PRE-HEARING DISCLOSURE

(entered March 2, 1982, unpublished)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 2, 1982.

HON. MILTON MOLLEN, Presiding Justice

HON. VINCENT D. DAMIANI,) (NOT TO BE PUBLISHED)
HON. VITO J. TITONE,)
HON. GUY J. MANGANO,) Associate Justices
HON. FRANK D. O'CONNOR.)

In the Matter of :
Julius M. Gerzof, :
a suspended attorney. :

Grievance Committee : Order on
for the Tenth : Motion
Judicial District, :

Petitioner; :

Julius M. Gerzof, :

Respondent. :

In the above entitled disciplinary pro-

ceeding, this court, by an order dated December 9, 1981, inter alia, having referred the issues raised by the petition and the answer herein to Hon. DANIEL G. ALBERT, a retired Justice of the Supreme Court, as Special Referee, for an expeditious hearing and to report together with his recommendations; and the respondent having moved, by a notice of motion, dated January 15, 1982, for leave to conduct discovery proceedings prior to the hearings directed to be held by this court's said order, dated December 9, 1981, seeking: (1) the report of the petitioner to this court upon which a prior order of this court, dated April 9, 1981, authorizing the proceeding against the respondent was based; (2) the names and addresses of all witnesses intended to be called at the hearing by petitioner, as well as the names and addresses of all persons interviewed by petitioner in its underlying

investigation who are not intended to be called and all other exculptary information obtained during the court of that investigation; and (3) examination of all witnesses before hearing and/or trial;

Now, upon the said notice of motion, the affidavits of Julius M. Gerzof and Stephen W. Schlissel, the exhibits annexed thereto and the respondent's memorandum of law in support of said motion; the affidavit of Louis J. Profera and the exhibits annexed thereto in opposition to the said motion and the reply affidavit of Douglas J. Good and the exhibit annexed thereto; and the motion having been submitted by Douglas J. Good, Esq., of counsel for the respondent and submitted by Louis J. Profera, Esq., of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED, that the said motion is hereby denied in all respects.

Enter:

/s/ IRVING N. SELKIN

Clerk of the Appellate
Division.

DECISION SLIP

No. 613
In the Matter of Julius M. Gerzof, a suspended attorney.

The Grievance Committee for the Tenth Judicial District, petitioner;
Julius M. Gerzof, respondent.

Motion by respondent for leave to conduct discovery proceedings prior to the hearings directed to be held by order of this court.

The respondent seeks in the disclosure proceedings:

1) The report of the petitioner to this court upon which the order dated April 9, 1981, authorizing the proceeding against the respondent was based;

2) The names and addresses of all wit-

nesses intended to be called at the hearing by petitioner, as well as the names and addresses of all persons interviewed by petitioner in its underlying investigation, who are not intended to be called and all other exculpatory information obtained during the course of that investigation;

3) Examination of all witnesses before hearing and/or trial.

Motion denied in all respects.

MOLLEN, P.J., DAMIANI, TITONE, MANGANO & O'CONNOR, J.J., concur.

ORDERS AND DECISIONS OF THE COURT OF APPEALS OF NEW YORK DISMISSING, INTER ALIA, APPEAL FROM ORDER DENYING MOTION TO DISMISS THE PETITION AGAINST APPELLANT (entered February 23, 1982, and March 25, 1982, respectively)

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of February A.D. 1982

P R E S E N T,

HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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2 Mo. No. 185 ABC
In the Matter of Julius M. Gerzof a Suspended Attorney.
The Grievance Committee for the Tenth Judicial District,

Respondent,

vs.

Julius M. Gerzof,

Appellant.

(Appeal No. 1)

In the Matter of Julius Gerzof,
Solomon A. Klein,

Respondent,

vs.

Julius Gerzof,

Appellant.

(Appeal No. 2)

Motions having heretofore been made herein (A) upon the part of the appellant Gerzof for a stay and for consolidation of the appeals, and (B&C) upon the parts of the respondents to dismiss the appeals taken by the appellant in the above causes to this Court, papers having been submitted on each motion and due deliberation having been thereupon had, it is

ORDERED, that the said motions (B&C) to dismiss the appeals be and the same hereby are granted and the appeals dismissed, without costs, upon the ground that the orders appealed from do not finally determine the proceedings within the meaning of the Constitution; and it is

ORDERED, that the said motion (A) for a stay and consolidation be and the same hereby is dismissed as academic.

/s/ JOSEPH W. BELLACOSA

Clerk of the Court

Decision Slip

2 Mo. No. 185
In the Matter of Julius M. Gerzof a Suspended Attorney. The Grievance Committee for the Tenth Judicial District,

Respondent,

vs.

Julius M. Gerzof,

Appellant.
(Appeal No. 1)

In the Matter of Julius Gerzof, Solomon A. Klein,

Respondent,

vs.

Julius Gerzof,

Appellant.
(Appeal No. 2)

Motions to dismiss the appeals herein granted and the appeals dismissed, without costs, upon the ground that the orders appealed from do not finally determine the proceedings within the meaning of the Constitution.

Motion to consolidate the appeals and for a stay dismissed as academic.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of March A.D. 1982

P R E S E N T,

HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

Mo. No. 247

In the Matter of Julius M. Gerzof a Suspended Attorney. The Grievance Committee for the Tenth Judicial District,

Respondent,

vs.

Julius M. Gerzof,

Appellant.

(Appeal No. 1)

In the Matter of Julius Gerzof, Solomon A. Klein,

Respondent,

vs.

Julius Gerzof,

Appellant.

(Appeal No. 2)

This Court on February 23, 1982 having granted motions to dismiss the appeals taken by the appellant in the above causes,

Now, on the Court's own motion and on resubmission of appellant's opposing papers, said motions to dismiss the appeals are reconsidered; due deliberation now having been had thereon, it is

Ordered, upon reconsideration, that the Court hereby adheres to its determination of February 23, 1982 dismissing the appeals herein.

/s/ JOSEPH W. BELLACOSA

Clerk of the Court

Decision Slip

Mo. No. 247

In the Matter of Julius M. Gerzof a Suspended Attorney. The Grievance Committee for the Tenth Judicial District,

Respondent,

vs.

Julius M. Gerzof,

Appellant.

(Appeal No. 1)

In the Matter of Julius Gerzof, Solomon A. Klein,

Respondent,

vs.

Julius Gerzof,

Appellant.

(Appeal No. 2)

On the Court's own motion and on resubmission of appellant's opposing papers, motions to dismiss appeals reconsidered and, upon reconsideration, the Court adheres to its determination dismissing the appeals.

ORDER AND DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT DENYING CROSS-MOTION TO DISMISS OR IN THE ALTERNATIVE TO COMPEL A MORE DEFINITE PETITION AND DIRECTING A HEARING AND APPOINTING A REFEREE.

(entered December 9, 1981; unreported)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 9, 1981.

HON. MILTON MOLLEN, Presiding Justice

HON. JAMES D. HOPKINS,)
HON. VINCENT D. DAMIANI,)
HON. VITO J. TITONE,) Associate Justices
HON. FRANK D. O'CONNOR.)

In the Matter of Julius M. Gerzof, a suspended attorney.	:	
Grievance Committee for the Tenth Judicial District,	:	Order of Reference, etc.
Petitioner;	:	
Julius M. Gerzof,	:	
Respondent.	:	

A disciplinary proceeding having been instituted in this court upon the petition of the Grievance Committee for the Tenth Judicial District in respect to Julius M. Gerzof, a suspended attorney and counselor at law (originally admitted to practice by this court on May 6, 1936); the petition praying that the respondent be disciplined upon the charges therein set forth; the proceeding having come on before this court by a notice of petition, dated August 18, 1981; and the respondent having moved, by a notice of cross motion, dated September 28, 1981, to vacate the order of this court, dated April 9, 1981, which authorized this proceeding, and to dismiss the proceeding on the grounds that this court does not have jurisdiction and the said petition does not state a cause of action against the respondent or, in the alternative, to compel the petitioner to serve a more definite and certain petition

as he cannot frame his answers thereto;

Now, upon the said petition, verified August 18, 1981; respondent's said notice of cross motion, the affidavits of Julius M. Gerzof and Stephen W. Schlissel and the exhibits annexed thereto, including the respondent's proposed answer to the petition; and the respondent's memorandum in support of the said cross motion; the affidavit of Louis J. Profera and the memorandum in opposition to the said cross motion; the affidavit of Julius M. Gerzof in reply thereto; and upon all the papers filed herein; and Louis J. Profera, Esq., having appeared of counsel for the petitioner and Stephen W. Schlissel, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the respondent's cross

motion is hereby denied, and it is further

ORDERED that the proposed answer of respondent, dated September 25, 1981, attached to the said cross motion is hereby deemed his answer to the petition herein, and it is further

ORDERED that the issues raised by the said petition and answer are hereby referred to Hon. DANIEL G. ALBERT, a retired Justice of the Supreme Court, as Special Referee, for an expeditious hearing and to report together with his recommendations.

Enter:

/s/ IRVING N. SELKIN

Clerk of the Appellate Division.

DECISION SLIP

In the Matter of Julius M. Gerzof, a suspended attorney

The Grievance Committee for the Tenth Judicial District, petitioner;

Julius M. Gerzof, respondent.

No. 6170

Proceeding by petitioner to punish re-

spondent, a suspended attorney for professional misconduct committed while under this court order of suspension.

No. 6573

Cross motion by respondent to vacate this Court's order, dated April 9, 1981, which authorized this proceeding, and to dismiss the proceeding on the grounds that this court does not have jurisdiction and the petition does not state a cause of action against respondent, or in the alternative, to compel the petitioner to serve a more definite and certain petition as he cannot frame his answer thereto.

No. 6593

Cross petition by respondent Julius M. Gerzof, for immediate reinstatement to the Bar of the State of New York, on the grounds that he has completed his period of suspension and that the petitioner is merely attempting to harass him by the

above additional charges.

Cross motion and cross petition by the respondent are denied. The proposed answer of respondent, dated September 25, 1981, attached to his cross motion to dismiss is deemed his answer to the petition and the issues raised by the petition and answer are referred to:
Hon. Daniel G. Albert, a retired Justice of the Supreme Court, as Special Referee for an expeditious hearing and to report together with his recommendations.

MOLLEN, P.J., HOPKINS, DAMIANI, TITONE & O'CONNOR, J.J., concur

ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT DENYING APPELLANT'S MOTION, INTER ALIA, TO DIRECT COMMITTEE ON CHARACTER AND FITNESS TO ACT ON APPLICATION FOR REINSTATEMENT (entered April 9, 1981)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 9, 1981.

HON. MILTON MOLLEN, Presiding Justice

HON. JAMES D. HOPKINS,)
HON. VINCENT D. DAMIANI,) (NOT TO BE PUBLISHED)

HON. VITO J. TITONE,)
HON. LEON D. LAZER,) Associate Justices

In the Matter of Julius M. Gerzof, a suspended attorney.	: : : :	Order on Motion.

In the above entitled prceeding, this court by an order and decision, both dated October 6, 1980, having referred the application by the above named Julius Gerzof, a suspended attorney, for rein-

statement to the Bar to the Committee on Character and Fitness for the Second, Tenth and Eleventh Judicial Districts, to investigate, hear and report (1) on the question of whether the petitioner complied with this court's prior order of suspension; (2) whether the petitioner presently possesses the character and fitness requisite for an attorney and counselor at law and (3) directed that, pending the receipt of the Committee's Report, the application for reinstatement be held in abeyance; and the petitioner having moved, by a notice of motion dated February 5, 1981, for an order immediately reinstating him, or in the alternative, directing the immediate processing of the application for reinstatement presently before the said Committee on Character and Fitness and directing the said Committee immediately report back to this Court within 30 days of this motion;

Now, upon the papers filed in support of the said motion and the papers filed in opposition and in relation thereto; and the motion having been duly submitted, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby denied, and it is further

ORDERED that petitioner's application for reinstatement will be held in abeyance pending the outcome of the new disciplinary proceeding which this court, by separate order and decision, both dated April 9, 1981, has authorized the Grievance Committee for the Tenth Judicial District to institute and prosecute in this court, as petitioner, against the said Julius Gerzof.

Enter:
/s/ IRVING N. SELKIN
Clerk of the Appellate Division.

DECISION SLIP

No. 1141

In the Matter of Julius Gerzof, a suspended attorney.

Ruskin, Schlissel, Moscou & Evans, P.C., for petitioner.

Louis J. Profera, Deputy Counsel, Grievance Committee for the Tenth Judicial District, for respondent.

By order of this Court dated October 6, 1980, the petitioner's application for reinstatement was referred to the Committee on Character and Fitness for the Second, Tenth and the Eleventh Judicial Districts, to investigate, hear and report (1) on the question of whether petitioner complied with this Court's order of suspension; and (2) whether petitioner presently possesses the character and fitness requisite for an attorney and counselor-at-law. The Court further ordered that pending receipt of the Character Committee's report, the application for reinstatement was to be held in abeyance.

The petitioner now moves for an order immediately reinstating him, or in the alternative, directing the immediate processing of the application for reinstatement presently before the Committee on Character and Fitness and directing that said Committee immediately report back to this Court within 30 days of the determination of this motion.

After the Committee on Character and Fitness learned that there was pending before the Grievance Committee for the Tenth Judicial District allegations that petitioner was practising law while under suspension the Committee on Character and Fitness indicated that it would not render its report until the complaints pending at the Grievance Committee was resolved.

After the receipt of the instant motion this Court directed the Grievance Committee to expedite its report.

The Grievance Committee for the Tenth

Judicial District has now requested authorization to institute a disciplinary proceeding against the petitioner herein. Said request is granted by separate motion slip this date.

In view of the foregoing, petitioner's instant motion is denied. Petitioner's application for reinstatement will be held in abeyance pending the outcome of the new disciplinary proceeding.

MOLLEN, P.J., HOPKINS, DAMAINI, TITONE & LAZER, J.J., concur.

ORDER AND DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT GRANTING APPELLEE'S MOTION, WITHOUT NOTICE TO APPELLANT, FOR LEAVE TO INSTITUTE AND PROSECUTE FORMAL DISCIPLINARY PROCEEDINGS AGAINST APPELLANT

(entered April 9, 1981; unpublished)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 9, 1981.

HON. MILTON MOLLEN, Presiding Justice

HON. JAMES D. HOPKINS,)
HON. VINCENT D. DAMIANI,) (NOT TO BE PUBLISHED)

HON. VITO J. TITONE,)
HON. LEON D. LAZER,) Associate Justices

In the Matter of Julius M. Gerzof, a suspended attorney.	:	Order Authorizing Disciplinary Proceeding.

Based upon the acts of professional misconduct set forth in the Report of the Grievance Committee for the Tenth Judicial District attached to its petition, dated

April 2, 1981, with respect to Julius M. Gerzof, a suspended attorney, who was admitted to practice by this court on May 6, 1936; and upon the decision slip of the court herein heretofore filed and made a part hereof; and pursuant to statute (Judiciary Law, § 90, subd 7), it is

ORDERED that the Grievance Committee for the Tenth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against the said Julius M. Gerzof based upon the acts of professional misconduct set forth in the said Committee Report, and on any other charges of professional misconduct by said suspended attorney which may come to the Committee's attention, and it is further

ORDERED that Francis F. Doran, Esq., Chief Counsel to the Grievance Committee for the Tenth Judicial District, 158 Third Street, Mineola, New York, 11501, is here-

by appointed as attorney for the petitioner in such proceeding.

Enter:
/s/ IRVING N. SELKIN
Clerk of the Appellate Division.

DECISION SLIP

No. 89 Disc. Atty.
In the Matter of Julius M. Gerzof, a suspended attorney.

Pursuant to statute (Judiciary Law, § 90, and subd. 7), the Grievance Committee for the Tenth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against Julius M. Gerzof, a suspended attorney, who was admitted to practice in this court on May 6, 1936, based upon acts of professional misconduct set forth in the Committee Report attached to its petition, dated April 2, 1981, and on any other charges of professional misconduct by said suspended attorney may come to the Committee's attention.

Francis F. Doran, Esq., Chief Counsel to

the Grievance Committee for the Tenth Judicial District, 158 Third Street, Mineola, New York 11501, is hereby appointed as attorney for the petitioner in such proceeding.

MOLLEN, P.J., HOPKINS, DAMAINI, TITONE & LAZER, J.J., concur.

NOTICE OF APPEAL TO
UNITED STATES SUPREME COURT

COURT OF APPEALS
STATE OF NEW YORK

----------X

In the Matter of Julius M. Gerzof :
a suspended attorney,
:
THE GRIEVANCE COMMITTEE FOR
THE TENTH JUDICIAL DISTRICT, :

Respondent, :

-against- :

JULIUS M. GERZOF :

Appellant. :

----------X

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES;

FILED IN THE APPELLATE DIVISION, SECOND

DEPARTMENT ON DECEMBER 12, 1984 AND FILED

IN THE COURT OF APPEALS OF NEW YORK ON

DECEMBER 13, 1984

Notice is hereby given that Julius M. Gerzof, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the

Court of Appeals of the State of New York dismissing the appeal taken by appellant from the Order of Disbarment, dated and entered May 29, 1984, of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in this action on September 18, 1984.

This appeal is taken pursuant to 28 U.S.C. & 1257(2).

RUSKIN, SCHLISSEL, MOSCOU
& EVANS, P.C.
Attorney for Appellant
170 Old Country Road
Mineola, New York 11501
(516) 248-9500

/s/_____
Stephen W. Schlissel,
Of Counsel

/s/_____
Douglas J. Good,
Of Counsel

FORMAL CHARGES CONTAINED IN THE PETITION OF APPELLEE

Charge One

From or about October 1, 1977 to the present, respondent has engaged in the practice of law in violation of Section 691.10 of the Rules of the Appellate Division of the Supreme Court, Second Department and Sections 484 and 486 of the Judiciary Law while subject to an order of suspension issued by this Court, in a manner hereinafter specified:

1. The respondent was suspended from the practice of law for three (3) years by order of this Court, dated September 9, 1974, effective October 1, 1974, such effective date having been amended due to stays and appeals to October 1, 1977 and continuing until further order of this Court, with leave to apply for reinstatement after expiration of said period. The respondent has not been reinstated.

2. Since the effective date of his suspension to the present, the respondent has continued to practice law in that:

a. He has maintained his presence at 71 North Main Street, Freeport, New York, the address of his former law practice;

b. He has employed MELVYN HACKER, Esq., WILLIAM T. STEVENS, Esq. and other attorneys, through whom he has continued to practice law;

c. He has retained his former law clients and solicited new clients since his suspension commenced;

d. He has appeared as an attorney and counselor-at-law in legal matters and before courts; and

e. He has received compensation for legal services which he has rendered during the period of his supension.

3. The respondent has engaged in the unauthorized practice of law since his suspension commenced.

Charge Two

From or about October 1, 1977 to the present, the respondent has expressed and issued false statements to the Appellate Division of the Supreme Court, Second Department and the Character and Fitness Committee for the Second Judicial Department in violation of DR 1-101(A) and DR 1-102(A)(4) of the Lawyer's Code of Professional Responsibility, of Section 210.40 of the Penal Law of the State of New York and of Section 691.10 of the Rules of the Appellate Division of the Supreme Court, Second Department, in a manner hereinafter specified:

1. In or about October 10, 1977, the respondent issued materially false statements in his affidavit of compliance with the rules of this Court concerning the conduct of a suspended attorney in that he intended and did in fact continue to practice law during the period of his suspen-

sion, such affidavit being dishonest, fraudulent, deceitful and constituting a misrepresentation.

2. In or about July 8, 1980 to the present, the respondent has issued materially false statements in his application for reinstatement to this Court and the Character and Fitness Committee and in his affidavits in support of motions and in opposition to motions before this Court and the Court of Appeals.

3. The respondent has failed to inform the Appellate Division, Second Department and the Character and Fitness Committee that he has been engaged in the unauthorized practice of law.

CONSTITUTION OF THE UNITED STATES

AMENDMENT 14

§ 1. Citizenship rights not to be abridged by states

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. JUDICIARY LAW § 90 (MCKINNEY 1983)

§90. Admission to and removal from practice by appellate division; character committees

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of at-

torneys.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the appellate division of the supreme court in the first judicial department and the committee on character and fitness appointed by the appellate division of the supreme court of the second judicial department, may each, with the written consent of the justices of each such appellate divisions or a ma-

jority of such justices, acting for their respective appellate divisions from time to time, appoint and remove a secretary, stenographers and assistants, and procure a suitable office for each committee, properly furnished and equipped and all books, stationery, blanks, postal cards, expressage and postage stamps as shall be required for the proper performance of the duties of each such committee.

e. The salaries of such secretary, stenographers and assistants shall be fixed for each department by the justices of the appellate division in each department or a majority of them in each department.

f. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the first judicial department, shall, in the said first judicial department, be paid by the comptroller of the

city of New York.

g. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the second judicial department shall be certified by the presiding justice of such department to the state comptroller who shall audit the same. The state department of taxation and finance shall pay such salaries and expenses and shall apportion the same among the counties comprising the second judicial department. Such counties shall reimburse the state for such compensation. The time and method of such apportionment and the time and method of such reimbursement shall be as specified in section seventy-four of this chapter.

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appel-

late division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition

it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provi-

sions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

4. a. Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

b. Whenever any attorney and counsellor-at-law shall be convicted of a felonry as defined in paragraph e of this

subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

c. Whenever an attorney shall be convicted of a crime in a court of record of the United States or of any state, territory or district, including this state, whether by a plea of guilty of nolo contendere or from a verdict after trial or otherwise, the attorney shall file, within thirty days thereafter, with the appellate division of the supreme court, the record of such conviction.

The failure of the attorney to so file shall be deemed professional misconduct provided, however, that the appellate division may upon application of the attorney, grant an extension upon good cause

shown.

d. For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

e. For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or

territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

f. Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.

Upon good cause shown the appellate division of the supreme court may, upon application of the attorney or on its own motion, set aside such suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice.

g. Upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not be made.

h. If the attorney requests a hearing, the appellate division of the supreme court shall refer the proceeding to a referee, justice or judge appointed by the appellate division for hearing, report and recommendation.

After said hearing, the appellate division may impose such discipline as it deems proper under the facts and circumstances.

5. a. If such removal or debarment was based upon conviction for a serious crime or upon a felony conviction as defined in subdivision four of this section, and such felony conviction was subsequently reversed or pardoned by the president of the

United States, or governor of this or another state of the Unites States, the appellate division shall have power to vacate or modify such order or debarment, provided, however, that if such attorney or counsellor-at-law has been removed from practice in another jurisdiction, a pardon in said jurisdiction shall not be a basis for application for re-admission in this jurisdiction unless he shall have been readmitted in the jurisdiction where pardoned.

b. If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period.

c. An attorney and counsellor-at-law who has been convicted of a felony without

the state and whose name has been struck from the roll of attorneys prior to July thirteenth, nineteen hundred seventy-nine by virtue of the provisions of subdivision four of this section may, if he alleges that such felony committed without the state would not constitute a felony if committed within the state, petition the appellate division to vacate or modify such debarment. If the appellate division finds that the felony of which the attorney and counsellor-at-law has been convicted without the state would not constitute a felony if committed within the state, it shall grant a hearing and may retroactively vacate or modify such debarment and impose such discipline as it deems just and proper under the facts and circumstances.

The attorney and counsellor-at-law shall petition for reinstatement by filing in the appellate division a copy of the order

of removal together with a request for a hearing pursuant to the provisions of this paragraph. Upon such application, the order of removal shall be deemed an order of suspension for the purposes of a proceeding pursuant to this paragraph.

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other

than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to pro-

fessional conduct of an attorney and counsellor-at-law, to be paid out of funds appropriated to the office of court administration for that purpose.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered, which

compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.[*]

9. No objection shall be taken to the appointment of any member of the bar to act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a bar asso-

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[*"Now Const. Art. 6, §3" (publisher's footnote) New York Constitution, Art. 6, §3 appears beginning at p. 118a, infra.]

ciation or other corporation or association which is the petitioner therein.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor-at-law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to

them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

NEW YORK CONSTITUTION

ARTICLE 6, SECTION 3

Art. 6, §3

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division

or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceedings wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of

the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for

review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, comission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally

determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the apellate division was from a judgment or order entered in an appeal from another court including an appellate or special

term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

22 NYCRR - Part 691 - CONDUCT OF ATTORNEYS (Pertinent Sections)

§691.1. Application

(a) This Part shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have offices in the Second Judicial Department, or who are admitted to practice by a court of another jurisdiction and who regularly practice within this department as counsel for governmental agencies or as house counsel to corporations or other entities, or otherwise. In addition, any attorney from another state, territory, district or foreign country admitted pro hac vice to participate in the trial or argument of a particular cause in any court in the Second Judicial Department, or who in any way participates in an action or proceeding therein, shall be subject to this Part.

(b) The imposition of discipline pursuant to this Part shall not preclude the

imposition of any further or additional sanctions prescribed or authorized by law, and nothing contained in this Part shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it such as the power of contempt, nor to prohibit bar associations from censuring, suspending or expelling their members from membership in the association or from admonishing attorneys in minor matters; provided, however, that such action by a bar association shall be reported to the appropriate committee appointed pursuant to section 691.4(a) of this Part, and provided further, that such action by a bar association shall not be a bar to the taking of other and different disciplinary action by this court or by a committee appointed pursuant to section 691.4(a) of this Part.

§691.2. Professional Misconduct Defined

Any attorney who fails to conduct himself, either professionally or personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, as amended to May 1, 1978, or any canon of the Canons of Professional Ethics, as adopted by such bar association, or any of the special rules concerning court decorum, shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law.

§ 691.4. Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct; Complaints; Procedure

(a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or

concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

(b) (1) Each grievance committee shall consist of nineteen members and a chairman, all of whom shall be appointed by this court and sixteen of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee. Appointments may be made from lists of prospective members submitted by the following county bar associations within the second judicial department: Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County,

New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association, Rockland County Bar Association, Inc., Suffolk County Bar Association and Westchester County Bar Association. This court shall, in consultation with the committees, appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as it deems necessary.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. Thereafter, yearly appointments of five persons shall be made to each such committee for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the

expiration of his second such term. The person appointed chairman shall serve as chairman for a term of two years and shall be eligible for reappointment as chairman for not more than one additional term of two years.

(3) The members of the joint bar association grievance committees as volunteers are expressly authorized to participate in a state-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law.

(c) Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may be commenced sua sponte by this court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

(d) Each grievance committee shall have the power to appoint its members to subcommitteees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges

predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than twenty days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the committee to prepare and serve an

additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing, the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent, or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of caution may also be issued where the charges have been dismis-

sed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall be filed with this court along with any majority report and the written report of the subcommittee. Upon such filing, the committee shall await the determination of this court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.

(k) Disciplinary proceedings shall be granted a preference by this court.

§ 691.5. Investigation of Professional Misconduct on the Part of an Attorney; Subpoenas and Examination of Witnesses Under Oath

(a) Upon application by the chairman or acting chairman of any such committee, or upon application by counsel to such committee, disclosing that such committee is conducting an investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice, for the attendance of witnesses and the production of books and papers before such committee or such counsel, or any subcommittee thereof designated in such application, at a time and place therein specified.

(b) Any such committee or a subcommittee thereof is empowered to take and cause to be transcribed the evidence of witnes-

ses who may be sworn by any person authorized by law to administer oaths.

§ 691.10. Conduct of Disbarred, Suspended or Resigned Attorneys; Abandonment of Practice by Attorney

(a) Compliance with Judiciary Law. Disbarred, suspended or resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary Law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.

(b) Compensation. A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the Bar. A disbarred, sus-

pended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client. Such applications shall be made at special term in the court wherein the action is pending or at special term in the Supreme Court in the county wherein the moving attorney maintains his office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been required to pay had no substitution of attorneys been required.

(c) Notice to Clients Not Involved in Litigation. A disbarred, suspended or resigned attorney shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigated or administrative matters or proceedings pending in any court or agency, of his disbarment, suspension or resignation and his consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation and shall advise said clients to seek legal advice elsewhere.

(d) Notice to Clients Involved in Litigation. (1) A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, each of his clients who is involved in litigated matters or administrative proceedings, and the attorney or attorneys for each adverse party in such

matter or proceeding, of his disbarment, suspension or resignation and consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation. The notice to be given to the client shall advise of the prompt substitution of another attorney or attorneys in his place.

(2) In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension or resignation, it shall be the responsibility of the disbarred, suspended or resigned attorney to move pro se in the court in which the action is pending, or before the body in which an administrative proceeding is pending, for leave to withdraw from the action or proceeding.

(3) The notice given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred, suspended or resigned at-

torney. In addition, notice shall be given in like manner to the Office of Court Administration of the State of New York in each case in which a retainer statement has been filed.

(e) Conduct After Entry of Order. The disbarred, suspended or resigned attorney, after entry of the disbarment or suspension order or after entry of the order accepting the resignation, shall not accept any new retainer or engage in any new case or legal matter of any nature as attorney for another. However, during the period between the entry date of the order and its effective date he may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(f) Filing Proof of Compliance and Attorney's Address. Within ten days after the effective date of the disbarment or suspension order or the order accepting

the resignation, the disbarred, suspended or resigned attorney shall file with the clerk of the Appellate Division for the second judicial department an affidavit showing:

(1) that he has fully complied with the provisions of the order and with these rules; and

(2) that he has served a copy of such affidavit upon the petitioner or moving party.

Such affidavit shall also set forth the residence or other address of the disbarred, suspended or resigned attorney where communications may be directed to him.

(g) Appointment of Attorney to Protect Clients' Interests and Interests of Disbarred, Suspended or Resigned Attorney. Whenever it shall be brought to the court's attention that a disbarred, suspended or resigned attorney shall have

failed or may fail to comply with the provisions of subdivisions (c), (d) or (f) of this section, this court, upon such notice to such attorney as this court may direct, may appoint an attorney or attorneys to inventory the files of the disbarred, suspended or resigned attorney and to take such action as seems indicated to protect the interests of his clients and for the protection of the interests of the disbarred, suspended or resigned attorney.

(h) Disclosure of Information. Any attorney so appointed by this court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of this court which appointed the attorney to make such inventory.

(i) Fixation of Compensation. This court may fix the compensation to be paid

to any attorney appointed by it under this section. The compensation may be directed by this court to be paid as an incident to the costs of the proceeding in which the charges are incurred and shall be charged in accordance with law.

(j) Required Records. A disbarred, suspended or resigned attorney shall keep and maintain records of the various steps taken by him under this Part so that, upon any subsequent proceeding instituted by or against him, proof of compliance with this Part and with the disbarment or suspension order or with the order accepting the resignation will be available.

(k) Abandonment of Practice by Attorney. When, in the opinion of this court, an attorney has abandoned his practice, this court, upon such notice to such attorney as it may direct, may appoint the chief counsel of the appropriate joint bar association grievance committee, or an

individual attorney, to take custody and inventory the files of such attorney and to take such action as seems indicated to protect the interests of his clients.

§ 691.11. Reinstatement

(a) Any attorney disbarred after hearings or by consent, or whose name has been stricken from the roll of attorneys pursuant to subdivision 4 of section 90 of the Judiciary Law or section 691.9 of this Part may not apply for reinstatement until the expiration of at least seven years from the effective date of the disbarment or removal. Any attorney suspended under the provisions of this Part shall be entitled to apply for reinstatement at such intervals as this court may direct in the order of suspension or in any modification thereof.

(b) Such application may be granted by this court only if the attorney establishes by clear and convincing evidence that

he has fully complied with the provisions of the order disbarring or suspending him or striking his name from the roll of attorneys, and only upon a showing of clear and convincing evidence that the attorney possesses the character and general fitness to practice law. This court will refer such application to the Committee on Character and Fitness in this judicial department or to a referee, justice or judge for a report before granting such application.

(c) This court in its discretion may direct that the necessary expenses incurred in the investigation and processing of an application for reinstatement be paid by the attorney.

(d) An individual applying for reinstatement shall serve a copy of such application upon the appropriate grievance committee and such committee may be heard in opposition to the application.

691.21. Preliminary Investigation of Any Party Unlawfully Practicing Law or Assuming to Practice Law

(a) Upon application by the chairman or acting chairman of the committee or subcommittee on unlawful practice of the law of any recognized bar association in any county in the Second Judicial Department, alleging that such committee or subcommittee has reasonable cause to believe that any party (to wit: any person, firm, corporation or other organization) is unlawfully practicing law or unlawfully assuming to practice law or is engaging in any business or activity which may involve the unlawful practice of law, and further alleging that such committee or subcommittee is conducting or intends to conduct an investigation with respect to such practice, business or activity, the clerk of this court is empowered and authorized to issue, in the name of the presiding jus-

tice of the court, subpoenas directing the attendance of witnesses and the production of books, papers and records before such committee or subcommittee at the time when and at the place where it will convene. The clerk of the court is also empowered and authorized to issue such subpoenas upon the application of any such party.

(b) Every committee or subcommittee conducting such preliminary investigation is empowered to take the testimony of witnesses under oath and to transcribe such testimony. Such witnesses may be sworn by any person authorized by law to administer oaths.

MURPHY, A STATEWIDE LAWYER DISCIPLINE SYSTEM FOR NEW YORK N.Y.S.B.J. (AUGUST 1980)

In 1878 the American Bar Association adopted its original constitution which provided for a Grievance Committee as one of its standing committees. Thereafter, the Grievance Committee was not heard from for twenty-six years when, in 1904, it inquired about ". . . what grievances your Committee should consider and the Association shoul act upon." The only answer given to that long silent but still standing committee was, "It is hard to answer that question."

In 1908 the ABA adopted the Canons of Professional Ethics which, until 1970, constituted this nation's primary body of ethical principles for attorneys. The Canons were based substantially upon the Alabama State Bar Association's 1887 Code of Ethics, itself derived from Judge Sharswood's lectures published in 1854.

The 1908 Canons were at least something and, as such, better than nothing.

In 1969, nearly one hundred years after the establishment of its Grievance Committee, and more than sixty years after its adoption of the Canons of Professional Ethics, the ABA coucluded that "Most of the Canons do not lend themselves to practical sanctions for violations." Thus, even to a kind eye, what was thought to be something was almost nothing. Indeed, ABA committees appointed to appraise the Canons had submitted reports in 1928, 1933, and 1937 recommending complete revisions, "but nothing came of those efforts", and, in 1954, "a distinguished committee of the American Bar Foundation made extensive studies of the Canons and recommended further work in the field, but the subject lay fallow for ten more years until the creation of [the ABA Special Committee on Evaluation of Ethical

Standards]" which produced the 1970 Code of Professional Responsibility.

How did local disciplinary bodies regulate the profession while the Canons were failing to "lend themselves to practical sanctions?" Canons are not required for the identification of theft, deceit, obstruction of justice, gross neglect, and other vices found in the dark side of the law's practice. In 1967 the ABA created a Special Committee on Evaluation of Disciplinary Enforcement, chaired by Tom C. Clark. For three years the Clark Committee examined lawyer discipline in the United States and, in its historically significant report, candidly reported what many lawyers knew and the public suspected. Disciplinary enforcement, the Clark Committee reported, was "a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward

disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors." The Clark Committee warned the "public dissatisfaction with the bar and the courts is much more intense than is generally believed within the profession" and predicted that "unless public dissatisfaction with existing disciplinary procedures is heeded and concrete action taken to remedy the defects, the public soon will insist on taking matters into its own hands." It recommended thirty-six disciplinary enforcement changes of which one, the "statewide centralization of disciplinary jurisdiction under the ultimate contorl of the highest court of the state", was virtually primary.

Moved by the Clark Report, the Administration Board of the Judicial Conference in 1971 established the Christ Committee to study New York's disciplinary system. In 1972 the Christ Committee, after conducting inquiries only within the legal profession, accepted many of the Clark Report's recommendations but rejected that of a statewide disciplinary organization, supporting instead the establishment by each Appellate Division of the disciplinary structure found desirable by it. The Christ Report stated that, "New York's existing division of disciplinary jurisdiction among the four Judicial Departments was cited with approval by the Clark Committee." However, the Clark Report's approval of New York's division of disciplinary jurisdiction was linked to the existence in New York of a statewide agency. As for the prosecutorial staffs of judicial district grievance committees

to be established pursuant to uniform rules proposed by the Christ Committee for each judicial department, the Christ Report assured the bar that prosecutorial staffs were to be controlled by the committees whose members were to be drawn from the organized bar.

Ten years have passed since the Clark Report and the ABA's adoption of the Code of Professional Responsibility. Almost eight years have slipped away since the Christ Report. Five years have elapsed since New York's organizational changes in its attorney discipline system. To some, the time may seem ripe to determine whether the public has benefitted from those changes or whether, though the cut of the suit is different, the fabric is the same. However interesting such an inquiry might prove, the public would gain little, for the inquiry, shaped by the issue whether the bar has been better dis-

ciplined, would not consider whether the public, bench, and bar may be better served by another system, one in which the public's interest predominates. It is to that alternative system that I speak.

I propose that the Appellate Divisions establish a statewide lawyer discipline system. Historically courts looked to the bar for what the bar would undertake administratively in self-discipline. The wheel, however, has turned. Now the adminstrative initiative is with the courts. No longer tolerable is the passive judicial disposition which led courts and bar to the creation of structurally closed disciplinary systems. Such a system exists in New York. It should be changed.

Initially, we should disabuse ourselves of the comfortable idea that in New York legal ethical problems are divided among four judicial departments, permanently joined, yet permanently separate. The

reality is very different. The Appellate Division, perhaps the most burdened intermediate appellate court in the nation, has in its two-county first judicial department approximately 35,000 attorneys, "one of the world's heaviest concentration of lawyers" who constitute more than half of the attorneys in New York. Forty percent of the grievances filed against attorneys in New York are filed in the first judicial department. A substantial majority of those attorneys, like many of the complainants against them, reside in the ten-county second judicial department. In fact, together the first and second judicial departments receive about seventy percent of the grievances filed against New York attorneys. Unlike grievances in other judicial departments, however, most complaints in the first judicial department involve attorneys who, but for the location of their offices, would be re-

spondents in another judicial department. Clearly, the first judicial department must deal with grievances against attorneys practicing in it no matter where they reside. However, the fact that most respondents and many complainants in the first judicial department reside elsewhere in the state is relevant to a true perception of New York's attorney problems, for we deal with professional conduct that penetrates appellate boundaries, affecting courts, parties, relationships, and property located within different parts of New York's departmental boundary grid. Accordingly, the temptation to treat each department as an entity ethically isolated from other departments should be resisted, for it will surely rise to inhibit change.

The primary reasons for restructing New York's disciplinary system are the separation of the system's prosecutorial and adjudicative functions and the imposition

upon the bar of a discipline uniform throughout the state. By establishing substantially the form of statewide disciplinary agency adopted by the 1979 American Bar Associations' Standards for Lawyer Disciplinary Proceedings, the Appellate Divisions could effect that separation and claim that uniformity. Establishment of a statewide system in New York would not be innovative, for New York, Ohio and Counecticut are the only states that do not have statewide disciplinary systems. As for the Christ Committee's rejection of the Clark Report's recommendation of a centralized disciplinary system, a statewide disciplinary system in New York may be established by rules jointly adopted by the four Appellate Divisions. The Appellate Divisions' continued exercise of their exclusive jurisdiction of disciplinary proceedings, but now restricted to matters wholly judicial, would be unim-

paired.

It may be said that separation of the present disciplinary system's prosecutorial and adjudicative functions is not constitutionally compelled. However, it is a poor argument that what the Constitution requires for fairness may not be enlarged by a broader perception of justice in the public's service. A brief discussion of the causes of that perception might be useful.

Consider the participants in a grievance proceeding. If tomorrow we were to construct a disciplinary model for New York, how should they be treated?

First, the complainant drafts a written charge. Often he states his complaint with a frustrating sense of imprecision, for his language must describe legal events over which he has no expert grasp. He himself may not prosecute that charge nor may he retain an attorney to prosecute

it. His anxiety is not allayed by the grievance committee's domination by lawyers nor is he comforted by the consideration of his complaint in a secret proceeding, one statutorily made so to protect not his but his lawyer's interests. He is not encouraged by the fact that very few lawyers are disciplined and, even then, often without severity and after long delay. Lawyers who steal, he reflects, do not fall from higher moral heights than burglars who misstep, yet when he hands his complaint to the committee receptionist he may fear that he is in a setting in which that moral judgment might not be shared. The complainant, therefore, is the weakest participant in the disciplinary proceeding.

All hands should agree that the complainant is entitled to the diligent investigation and prosecution of his complaint by the grievance prosecutor whose

function makes it least likely that he will identify himself with the accused attorney. Further, the complainant is entitled to a public hearing of his charge should the committee determine that probable cause exists to sustain it, for against probable cause and the public interest in open proceedings secrecy may stake no claim except the lesser self-interest of the accused attorney.

Second, the grievance prosecutor should be the public's representative, for by prosecution of the complainant's charge he acts in protection of the public. Though he does not represent the complainant, the grievance prosecutor advocates the complainant's charge, very much like the criminal prosecutor who proceeds on behalf of the People upon an individual's criminal complaint. Thus, the grievance prosecutor should not only be, but should appear to be, the public's representative and, as

such, he should be an independent actor in the disciplinary process, as are the committee and court. If his employment or duties depend upon the will of a committee constituted in the main of members of the bar, he will be looked upon as an extension of the committee. The grievance prosecutor so positioned may consider his self-interest to be congruent with that of the committee, its chairperson, or several influential committee members. A committee so empowered and present before his eyes has a larger reality than that of the absent public. Hence, when the committee's interest and that of the public conflict, the grievance prosecutor's self-interest, particularly the livelihood of himself and his family, may overbear a seemingly abstract loyalty to the public. Therefore, if in the execution of essentially adjudicative duties the committee does not require powers of control of the

grievance prosecutor, they should not possess them.

Third, in structuring the disciplinary model it is the relationship of the respondent attorney and committee that is the most crucial. The integrity of what occurs between them is the test of the disciplinary process. Drawing a fine likeness of that proceeding and dwelling upon substantial legal issues affecting it are beyond my general purpose. Yet, several brush-strokes are necessary.

We begin that of secrecy. It enshrouds virtually the whole of what occurs in New York's grievance system, for few attorneys are formally disciplined. Secrecy protects the accused attorney, but in secrecy he may be pursued by a committee because its character in some essential is alien to his own, either by way of beliefs, race, social or professional class, or some other discriminatory difference.

Secrecy protects other accused attorneys as well, therefore he will not know whether his prosecution is invidious. The single practitioner appearing before a committee to explain his commingling of a $1,500 escrow sum may well wonder whether attorneys involved in corporate domestic crimes or international corporate domestic crimes or international corporate bribery have been summoned to account, or whether he has been selected for the hunt because of a committee's need for moral exhiliration. He may think that, as in chess, so in life, position counts.

Putting aside discriminatory prosecution, the respondent attorney is exposed to extraordinary risks. No complaint is too old to lay against him. He may not effectively complain that its prosecution was idle. However maliciously false the charge, and though it may wholly involve his non-professional life, his accuser

speaks with absolute privilege. Of the proceeding which intends his punishment, he learns that, though his rights depend upon the proceeding's legal character, New York law has located that character in the twilight of quasi-criminal. After a formal proceeding before the committee or referree, the Appellate Division will decide the facts without hearing the witnesses, without oral argument, and ordinarily without stating its reasons should it reject the findings of the committee or referee. The accused attorney's physician, chiropractor, or pharmacist who is found guilty of professional misconduct may successfully attack that Board of Regents determination for lack of substantial evidence, but not so the attorney who, having been suspended or disbarred and impoverished, may be denied their services. Indeed, should he desire relief from the Court of Appeals, he will find

that the appellate gate through which he must pass has been made especially strait for him.

In sum, the respondent attorney is especially entitled to a disciplinary system in which a diligently and fairly prosecuted charge, if proved before an impartial tribunal will be followed by the disciplinary measure used in similar cases throughout the state.

As for the constitution and function of the committee, ideally it should be only an adjudicative body, unidentified as representatives of the organized bar or the Appellate Division, free of administrative oversight problems, free of suspicion of professional bias, its findings open to public examination and criticism.

Fourth, the court's only business in the disciplinary process should be the adjudication of formal proceedings. The fact and appearance of judicial detachment is

strengthened for that purpose when the other participants in the disciplinary process have not been appointed, nor are overseen, by the court. Thus, managerial power over prosecutorial and administrative adjudicatory functions should not be exercised by a court if, by judicial delegation, the risks inherent in the exercise of that power may be avoided. Surely it is not the proper business of a court to demand accountings of work from a grievance prosecutor or to prod a committee to press a grievance staff to greater productivity. Surely, it is less than seemly to require a court to approve annual disciplinary budgets and thus control the salaries of the grievance prosecutorial staff that appears before it. Such incursions by a court into areas beyond judicial decision making, however much inspired by good motives, tend to take a court into deep waters where its classical

identity becomes distorted. There attitudes old and unexamined may work incalculable mischief. Thus, it is sometimes said that the public's image of the bar is vital to that of the bench because the welfare of bench and bar are one. In that false notion the public hears the whisper that the bench will act to sustain a wholesome image of the bar upon which a comforted, ignorant public may look. Other examples avail but more need not be given, for the principle is simple. A court's identity, its promise of justice, is best kept when it tends only to its own fire.

In the 1979 American Bar Association's Standards for Lawyer Disciplinary and Disability Proceedings the framework of a model system for New York may be found. An outline of those standards shows how companionable they are with those of the disciplinary model that I have suggested.

The entities constituting the agency to administer New York's lawyer discipline system would be a statewide nine-member board, three-member hearing committees, and grievance prosecutors. The board, composed of six lawyers and three laymen, would be appointed by the Chief Judge of the Court of Appeals and the four Presiding Justices of the Appellate Divisions. The board would appoint hearing committees and grievance prosecutors, allocate matters to the committees for decision, review the committees' findings and disciplinary recommendations to the Appellate Division in the appropriate judicial department, and make the ultimate disciplinary recommendations to the Appellate Division in the appropriate judicial department. It would supervise the agency's operations and periodically review with the Appellate Divisions the conduct of the system. Each hearing committee, consti-

tuted of two lawyers and one layman, would review the dispositions recommended by the grievance prosecutor after investigations conducted by him, conduct hearings upon formal charges, and make written findings and disciplinary recommendations for submission to the board. Grievance prosecutors, appointed by the board to serve at its pleasure, would be vested with total investigative and prosecutorial responsibility. A dispositional recommendation of a grievance prosecutor would be reviewable by the chairman of a hearing committee whose decision, upon application by the prosecutor, would be finally reviewable by the chairman of another hearing committee. A complainant dissatisfied with a disposition made after investigation could appeal to a panel of the board which would approve, modify, or disapprove the disposition, or order further investigation of the matter. Upon service of formal

charges, filed by a grievance prosecutor with the board, the proceeding, now assigned by the board to a hearing committee, would be public. Review by the board of the committee's findings and disciplinary recommendation would be aided by the respondent's and prosecutor's briefs and oral argument. Should the respondent or prosecutor disagree with the board's disposition, review could be had before the appropriate Appellate Division.

Unlike New York's system, a statewide system such as that proposed by the Standards provides both an extraordinarily high degree of structural impartiality and the real prospect of the imposition of one standard of conduct throughout the state. In New York, the grievance prosecutor is the committee's attorney and both prosecutor and committee are appointees of the court having exclusive jurisdiction of the disciplinary process. Under the Standards

these interlocking connections, together with the administrative matters that encumber them, are disengaged. Thus, the statewide board, solely responsible for administering the disciplinary system and exercising final powers of adjudicative review within the agency, has a membership untraceable to any Appellate Division whose function is only adjudicatory. Grievance prosecutor and hearing committee are independent actors, the first neither representative of nor dependent upon the second, the findings of the second subject to the board's review, and both appointed not by any Appellate Division but by the board. The complainant's meritorious charge would be openly advanced by the public's representative, the grievance prosecutor, while accused attorneys would be more assured, than now they are, of the evenhanded, prompt prosecution of charges, wherever they stand in

personal or professional hierarchies.

Professional responsibility is an evolving concept. If a profession fails to satisfy the society it claims to serve, it risks the character of its continued existence. In an uncritical society, the content of professional responsibility may change slowly or not at all. Thus, the ABA's Canons of Professional Ethics were tolerable in 1908 when corporate lawyers could act in an immigrant society as "a speaking aristocracy in the presence of a silent democracy", yet the class descendents of those who so spoke during the first quarter of this century would not dare to so speak today. The reason lies not in the disappearance of an elite in the legal profession but in the appearance of an educated, activist public. In the early 1960's it was the public's criticism of the bar for the neglect of its public responsibilities that, in part, led to the

1970 Code. Today, nearly twenty years later, that public has been succeeded by an equally perceptive and articulate generation, one living in times of economic and political stress, less inclined to submit to claims of professional self-governance, more ready to demand delivery of judicial and professional obligations. Surely it would be a small grace for the bench to give, before demand, what the public deserves by moral right.

No. 84-952

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JULIUS M. GERZOF,

Appellant,

— against —

THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF IN OPPOSITION TO JURISDICTIONAL STATEMENT AND PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-952

JULIUS M. GERZOF, Appellant,

v.

THE GRIEVANCE COMMITTEE FOR

THE TENTH JUDICIAL DISTRICT, Appellee.

ON APPEAL FROM THE COURT OF APPEALS

OF NEW YORK

PRELIMINARY STATEMENT

This brief is submitted in opposition to the appellant's jurisdictional statement and request that it be treated as a petition for a writ of certiorari.

The appellant was suspended from the practice of law by the Appellate Division

of the New York State Supreme Court, Second Judicial Department, by its order of the court, after some three years of motions, appeals and actions, effective October 1, 1977. Such suspension was based upon a disciplinary proceeding wherein it was proven that the appellant had given false testimony before the Judicial Inquiry. He was suspended from the practice of law for three years.

Shortly after his premature application before the Appellate Division for reinstatement, the appellee's office received the affidavit of Joseph J. La Bella, Jr., stating that the appellant had engaged in the practice of law while suspended.

Based on that affidavit and preliminary investigation, his application before the Character & Fitness Committee was stayed pending the determination of the Grievance Committee.

After a report of the matter had been presented to the Grievance Committee for the Tenth Judicial District, it duly voted, based on a finding of probable cause, to seek authorization of the Appellate Division to institute a disciplinary proceeding against the appellant. Such authorization was granted and a notice of petition and petition was personally served upon the appellant.

The petition alleged, briefly, that he had engaged in the practice of law while suspended (Charge One) and submitted false statements to the Appellate Division and the Character & Fitness Committee that he had not practiced law during his suspension (Charge Two).

Hon. Daniel G. Albert, a retired Justice of the Supreme Court of the State of New York, was appointed by order of the Appellate Division, dated

December 9, 1981, as Special Referee, to hear and report on the issues involved and make recommendations.

A hearing was conducted which spanned some nineteen days and created a transcript of more than 3,000 pages with numerous exhibits. Post-hearing memoranda were submitted by both counsel and the Special Referee's report of 19 pages (reprinted in appellant's jurisdictional statement at page - 14a -), along with the entire record, was submitted to the Appellate Division.

In his report, the Special Referee sustained Charge One, deferred on Charge Two (the record of sworn affidavits by the appellant that he had not engaged in the practice of law during his suspension were already before the Appellate Division and the Character & Fitness Committee) and recommended disbarment.

After some motion practice by the appellant and the submission of motions to confirm and disaffirm the Special Referee's findings, the Appellate Division confirmed said findings, sustained Charge Two against the appellant and issued its order of disbarment.

Leave to appeal to the New York State Court of Appeals was made, opposed and denied on the ground that no substantial question was directly involved.

Now the appellant challenges the constitutionality of Judiciary Law §90 and 22 NYCRR Part 691 as he had previously done in 1974 through 1976 (See Mildner v. Gulotta, 405 F. Supp. 182; Gerzof v. Gulotta, 40 N.Y. 2d 825, 386 NYS 2nd 790, 87 Misc. 2d 768).

REASONS FOR NOT TAKING JURISDICTION AND DENYING THE WRIT

A. THE STATE OF NEW YORK HAS NOT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS

The questions raised and the arguments made by the appellant on the constitutionality of the New York State disci - plinary procedure have been time and time again addressed and answered by this Court and the State Courts.

In Gerzof v. Gulotta supra , the Court held as follows:

> Suspension from practice of law that resulted from disciplinary proceedings held pursuant to Judiciary Law were not subject to being characterized as violative of due process on ground that the Appellate Division acted as the grand jury, prosecutor, judge and jury. Const. art. 1, §6; U.S.C.A. Const. Amend. 14.
>
> Disciplinary proceedings held pursuant to Judiciary Law were not violative of due process by reason of fact that they called for procedures that were substantially similar to those followed

in civil actions by providing for a determination based upon a transcript and reported findings. Const. art. 1, § 6; USCA. Const. Amend. 14.

Provisions of Judiciary Law pertaining to procedures to be followed in disciplinary matters are not violative of due process in denying an individual the right to present an oral argument before the trier of facts. Const. art. 1, § 6, U.S.C.A. Const. Amend. 14

Procedure whereby individual who was subject of disciplinary proceedings was presented with notice of charges against him, was given an opportunity to confront and cross-examine adverse witnesses during a hearing before a special referee, and was represented by counsel who was given an opportunity to present a summation to referee, was not violative of due process, notwithstanding claim that individual was not given a statement of reasons for the eventual decision of the Appellate Division, where the referee not only prepared a report and a supplemental report which contained detailed findings of fact and conclusions respecting the specified charges, but a full transcript of the proceedings before the referee was submitted to the Appellate Division with the individual thereafter being given the opportunity

to file an extensive and detailed memorandum to that court. Const. art. 1, §6; U.S.C.A. Const. Amend. 14

Although Matter of Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L. Ed. 2d 117, speaks of a disciplinary proceeding as being of a "quasi-criminal" nature, it "hardly stands for an equation of criminal and disciplinary proceedings, a most unlikely view". Kelly v. Greason, 23 N.Y. 2d 268, 296 NYS 2d 937.

In New York State disciplinary proceedings are deemed to be "special proceedings" and as such, are generally accorded disclosure devises only by leave of the court, so that the court may preserve the summary nature of such proceedings.

(See CPLR, art. 4, §C400:3(6); § 408 and §408.1, McKinney's Consolidated Laws of New York)

A very significant case in the area of attorney discipline is Mildner v. Gulotta supra. In that case Judge Neaher says

that Judiciary Law §90 "is plainly not unconstitutional on its face and does, in fact, appear to comport with traditional notions of due process". He speaks of a disciplinary proceeding as being"an inquest - a gathering of facts concerning the conduct of an attorney, a subject more likely to be illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else."

Also, he states, that there is no constitutional requirement "that the Appellate Division, as final arbiter of the facts, has personally heard the accused attorneys or other witnesses or have allowed oral argument upon the motions to confirm or disaffirm the referees' reports".

Special factors applying to administrative proceedings which call for a written statement of findings and

reasons are not present here.

Also the argument of no evidence appears to be an attempt to relitigate the merits of the State proceedings.

B. THE STATE OF NEW YORK HAS NOT VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION

On the issue of equal protection we have extracted the following precepts from Gerzof v. Gulotta supra :

> The existence of treatment for different individuals is not, in and of itself, a violation of the right to equal protection. Const. art. 1, § 6: U.S.C.A. Const. Amend. 14
>
> Equal protection is not violated unless it is shown that there is no reasonable basis for differing treatment of different classes of individuals. Const. Art. 1, §6, U.S.C.A. Const. Amend. 14
>
> Equal protection requires only that a legislative classification be reasonable, not arbitrary, and rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons

> similarly circumstanced shall be treated alike. Const. art. 1, § 6, U.S.C.A. Const. Amend. 14.

In Mildner v. Gulotta, Judge Neaher can be quoted as stating:

> "There must be recognition that, in disciplining professionals, the State may legitimately find reason to conclude that differing procedural safeguards are appropriate for different professionals. (citations omitted). Thus there is no equal protection problem when the denial of appellate rights to attorneys to the same extent afforded other professionals or litigants is reasonable, resting 'upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'". Javits v. Stevens, 382 F. Supp. at 140, quoting from F.S. Royster Guano Co. V. Virginia, 253 U.S. 412, 415 (1920).

The discipline of attorneys is a special responsibility which rests with the courts and the vesting of original jurisdiction with the Appellate Division is no denial of equal protection, nor is the denial of an appeal as of right on

all questions of law and fact arbitrary or capricious. (Mildner v. Gulotta, supra).

C. THE STANDARD OF PROOF IN DISCIPLINARY PROCEEDINGS IS STILL A FAIR PREPONDERANCE OF THE CREDIBLE EVIDENCE

The standard of proof in disciplinary proceedings in New York State has traditionally been a fair preponderance of the credible evidence, and although the appellant attempts to impose the standards of "beyond a reasonable doubt" and "clear and convincing evidence", he has failed in doing so time and time again.

As a matter of fact, the Special Referee who heard the case, not only recognized the standard as being "a fair preponderance of the credible evidence" but stated in his report that:

> "I therefore conclude that the petitioner has established

> Charge One as set forth in the Petition, and I so find beyond any reasonable doubt." (Emphasis supplied)
> (See report of Special Referee pages 42a and 43a, reprinted in appellant's appendix).

Nor can the appellant rely upon Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d, 599 (1982) as having changed the standard as that case pertains to parental rights and makes no mention of attorney discipline.

The appellant's constitutional right of due process has not been violated because another standard of proof has not been required in his case.

D. THE COURT SHOULD NOT TAKE JURISDICTION OR GRANT A WRIT OF CERTIORARI

It appears to be well settled law that the Federal Courts will abstain from taking jurisdiction in State disciplinary

proceedings.

In Erdmann v. Stevens, 458 F. 2d, at 1209-10, the relationship between the court and attorneys was expressed as follows:

> " The court alone admits an applicant to practice before it. Thereupon he becomes an officer of the court. The power to discipline, like the power to admit an applicant to membership of the bar, rests exclusively with the court. Theard v. United States, 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957); People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487, (1928)

Justice Frankfurter, speaking for an unanimous court in Theard quotes Justice Cardozo, while Chief Judge of the New York Court of Appeals, as having said:

> "Membership in the bar is a privilege burdened with conditions." (Matter of Rouss, 221 N.Y. 81, 84 115 N.E. 782, 783).

Here, the appellant has been found to have made false statements to judicial bodies on at least two occasions, in his first disciplinary proceeding and

again in Charge Two of his second disciplinary proceeding. He has also violated the order of suspension of three years by the Appellate Division by engaging in the practice of law during that period, as proven in Charge One of his second disciplinary proceeding. He has obviously disregarded the conditions of membership in the bar which had been bestowed upon him along with the privilege granted him through such membership.

As the court put in it In re Ming, 469 F. 2d 1352, 1353 (7 Cir. 1972):

> "'[s]uch proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from official ministration of persons unfit to

practice.'".
Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1882).

Judge McMahon summarized the special relationship between the attorney and the court, as follows:

> "The intimate and delicate relationship between courts and lawyers has long justified the judiciary's careful scrutiny of the integrity and qualifications of thosewho practice before it. Thus, it would be peculiar, if not unreasonable, for the New York Legislature to place responsibility for disciplinary proceedings elsewhere than in the courts. No other body is as well qualified or as interested in determining whether an attorney is qualified to practice law."
> Javits v. Stevens, supra, 382 F. Supp. at 141.

In this case, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the court in which the appellant was originally admitted and had practiced before for many years, is the proper

court to determine and has determined that he is unfit to practice law.

In Mildner v. Gulotta, supra, Judge Neaher stated that:

> "[t]he federal courts must be extraordinarily reluctant to interject themselves into such proceedings."

The decision in that disciplinary proceeding was for abstention. Such decision was supported by Younger v. Harris 401 U.S. 37 (1971) and Anonymous v. Association of the Bar of the City of New York, 515 F. 2d 427, (2 Cir.)

More recently Chief Justice Burger held that: (1) state bar disciplinary proceedings were of a character to warrant federal court deference; (2) importance of state interest in

pending state disciplinary proceedings and in federal constitutional challenge to disciplinary rules called Younger abstention into play; and (3) because attorney had opportunity to raise and have timely decided by competent state tribunal federal issues involved, and because no bad faith, harassment or other exceptional circumstances dictated to contrary, federal courts should abstain from interfering with ongoing state disciplinary proceedings against him. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 192 S. Ct. 2515 (1982)

CONCLUSION

Based upon the above and upon this appellant's litigious history, we urge the Court to apply the Younger abstention and deny the appellant's application whether it be in the form of a

jurisdictional statement or a writ of certiorari.

Respectfully submitted,

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(3)

No. 84-952

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JULIUS M. GERZOF,

Appellant,

—against—

THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

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No. 84-952

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JULIUS M. GERZOF,
Appellant,

-against-

THE GRIEVANCE COMMITTEE FOR
THE TENTH JUDICAL DISTRICT,
Appellee.

On Appeal from the Court of Appeals
of the State of New York

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

INTRODUCTORY STATEMENT

This Brief is submitted on behalf of appellant, Julius M. Gerzof, to respond to "Appellee's Brief in Opposition to Jurisdictional Statement and Petition for Writ of Certiorari" which the Court may be treating as a motion to dismiss.*

ARGUMENT

A. The Court has Jurisdiction of this Appeal from the final judgment of the New York Court of Appeals Pursuant to 28 U.S.C. §1257(2).

Appellee does not assert that this case is not properly before the Court. No suggestion is made that any of appellant's Due Process or Equal Protection challenges to New York Judiciary Law §90 (McKinney, 1983) and the Second Department Rules promulgated pursuant thereto were not duly

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* On telephone inquiry, the Clerk's Office staff reported that appellee's submission would be treated as a motion to dismiss.

raised at every appropriate stage of the state court proceeding.

The Court has recognized that a state court may not avoid deciding federal questions and thus defeat jurisdiction of the Court. See, e.g. Wolfe v. State of North Carolina, 364 U.S. 177, 185 (1960). In analogous situations, the Court has entertained appeals from state courts of last resort which, although not considering appeals after full briefing, have rejected them for want of "debatable" constitutional questions. See e.g. Titus v. Wallick, 306 U.S. 282 (1939); Matthews v. Huwe, 269 U.S. 262 (1925). Here, the New York Court of Appeals dismissed appellant's appeal on the ground that "no substantial constitutional question is directly involved." See, Appendix to Appellant's Jurisdictional Statement, p. 1a. Thus, as in Titus, supra, and Matthews, supra, this Court has jurisdiction.

Under New York law (see, Judiciary Law §90 (4); New York Constitution Art. 6, §3), in attorney discipline cases, an appeal to the New York Court of Appeals from a final order of the Appellate Division lies as a matter of right only where there is directly involved the construction of the Constitution of the United States (and in one other circumstance not relevant herein).

When the New York Court of Appeals dismissed appellant's appeal on the ground that no substantial constitutional question was directly involved (see Appendix, p. 1a), its action constituted an affirmance of the Appellate Division's order of disbarment (see Appendix, p. 9a), which order (and its underlying opinion) rejected, sub silentio, appellant's federal constitutional claims. Thus, this appeal properly lies from the Court of Appeals' order. See, Stern and Gressman,

Supreme Court Practice, (5th ed. 1978), §3.22, p. 206; see also, Tumey v. State of Ohio, 273 U.S. 510, 515 (1927).

B. Appellant has raised his federal constitutional objections at the earliest point in the proceeding below and has preserved those objections throughout the course of the proceedings in the state court.

Appellee does not, in its motion to dismiss, directly assert that appellant has failed to raise duly any of the constitutional claims he has asserted in his Jurisdictional Statement. Appellee does, however, state:

> "Now the appellant challenges the constitutionality of Judiciary Law §90 and 22 NYCRR Part 691 as he had previously done in 1974 through 1976 . . ." Appellees' Brief, p. 5.

Certainly, the word "now" in that sentence was not intended to mean "in this Court, for the first time." Appellee well knows, and the record amply demonstrates that

appellant raised his federal constitutional claims, not only in his answer to the "Charges" filed, against him, but in motion practice in the Appellate Division even prior to the formal commencement of the disciplinary proceeding. The constitutional objections were preserved throughout the proceeding below and on appeal to the New York Court of Appeals. Thus, the constitutional questions are properly presented to the Court for determination.

C. The Constitutional questions are substantial.*

At least since Graham v. Richardson, 403 U.S. 365 (1971) was decided, it has been clear that labels such as "right" and "privilege" are not dispositive in

*The issues discussed herein are intended to demonstrate examples of the substantiality of appellant's claims; they do not constitute a narrowing of appellant's constitutional claims as set forth in his Jurisdictional Statement.

determining whether due process must be afforded before an individual is deprived of certain interests. Among those protected interests is the practice of law. See, e.g. Ex parte Garland, 4 Wall. 333, 379 (1866); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); In re Ruffalo, 390 U.S. 544 (1968).

Assuming, arguendo, that the right to practice law is classified as a "property" interest rather than a "liberty" interest, it is clear that it is a right which exists by virtue of state law. See, Judiciary Law §§90(1) (a), 460 et seq.; NY Civil Practice Law & Rules §§9401 et seq. (McKinney 1981); 22 NYCRR §§ 520, 690 (Second Department). As such, procedural due process governs any attempt by the state to deny, limit or revoke the right of one qualified, to practice law. One additional factor is present in this case: appellant had previously been subject to a

three-year suspension from the practice of law. The order of suspension, by fixing a three-year term of suspension, created an expectancy that at the expiration of three years appellant would be entitled to pursue his reinstatement and a promise that his reinstatement application would be acted on with due expediency.

Yet, in the instant case, after having been granted leave to file his reinstatement application, and after having filed it, appellant was effectively suspended anew for the reason that new charges were being first investigated, then preferred, and finally, adjudicated. From the time action was first deferred on his reinstatement application until the new charges were heard and determined, appellant was denied the right to practice law for a period of approximately three and one-half years, without any hearing of any kind. In effect, his suspension was

continued indefinitely.

From the time the appellee filed its sua sponte complaint against appellant until it applied to the Appellate Division for leave to institute and prosecute formal disciplinary proceedings, more than four months passed. It took more than an additional four months after leave to proceed was granted for the appellee to file and serve its petition and charges. During that period of approximately nine months, it appears that no probable cause determination was made; certainly appellant was never given notice and an opportunity to be heard in connection with any probable cause determination as may have been made. Yet, during that entire nine-month period appellant was suspended from the practice of law, notwithstanding that the three-year period of the prior suspension had expired.

There are two points at which some preliminary determination could have been made:

(a) by the appellee Grievance Committee, prior to seeking leave to institute formal proceedings (see, 22 NYCRR §691.4(e)); and (b) by the Appellate Division, in granting the Grievance Committee leave to institute and prosecute formal disciplinary proceedings. As to the first, appellant was never afforded an opportunity to be heard by the Grievance Committee, although he sought that opportunity. As to the second, he was not provided with notice of the Grievance Committee's application to the Appellate Division for leave to proceed. Further, the Appellate Division granted leave to the Grievance Committee to prosecute appellant on charges set forth in its application to that court". . . and on any other charges of professional misconduct . . . which may come to the Committee's attention." See, Appendix p. 88a. Since appellant has been denied access to the application by

the Grievance Committee, and to its "Report," he has been deprived of the means to support an effective challenge to that procedure, if it indeed purports to be a "probable cause" mechanism.

Appellant's due process right to a prior hearing flows from such cases as Bell v. Burson, 402 U.S. 535 (1971). His right to a prompt hearing is supported by Barry v. Barchi, 443 U.S. 55 (1979). Surely, Judiciary Law §90 and 22 NYCRR §691 have been applied in an unconstitutional manner, contrary to principles clearly established by prior rulings of this Court.

This appeal also presents substantial questions of procedural due process not previously determined by the Court. In Armstrong v. Manzo, 380 U.S. 545, 552 (1965), the Court stated that when property is taken by the state, a due process hearing must be furnished " . . .

at a meaningful time and in a meaningful manner." Appellant contends that the New York statute and Second Department regulations applicable to attorney discipline cases are unconstitutional in that attorneys are not guaranteed that a hearing will be conducted in a meaningful manner. Appellant asserts that he was denied the hearing required by due process for the reasons, inter alia, that:

--the charges failed to give adequate notice of the alleged misconduct so as to permit him to prepare to meet, confront and rebut adverse evidence and to prepare his defense;

--the inadequate notice was compounded by the denial of all pre-hearing disclosure and vacatur of his demand for a bill of particulars;

--the absence of disclosure was compounded by the limitation and denial

of requested trial subpoenae*;

--the inadequacies of the hearing were compounded by the denial of appellant's motion to remit to the Special Referee for findings of fact and conclusions of law;

--the absence of findings of fact and conclusions of law was compounded by the denial by the Appellate Division of appellant's request for oral argument before that court;

--the foregoing inadequacies were compounded by application of the "preponderance of the evidence" standard of proof and by the absence of an appeal as of right on errors of fact and plain

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*Among the matters sought by appellant, but denied him, both in pre-trial disclosure and by trial subpoena was exculpatory information contained in the file of appellee, the prosecuting body. Appellee never denied the existence of exculpatory information. No such information was disclosed or required to be disclosed. Cf. Brady v. State of Maryland, 373 U.S. 83 (1963).

(non-constitutional) errors of law.

The Court has not ruled on any of these questions in the context of attorney discipline proceedings. Yet these are issues of considerable public importance and of especial importance to members of the bar.*

D. Responding to Appellee's Brief

As stated supra, appellee does not assert that the Court is without jurisdiction of this appeal pursuant to 28 U.S.C. §1257(2). Rather, appellee appears to argue that some of appellant's due process and equal protection challenges are without merit. It is significant to note, however, that appellee cites no decision of this Court

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*There are approximately 70,000 lawyers in New York State. ABA Standing Committee on Professional Discipline, Evaluation of the Lawyer Disciplinary System of the State of New York (Final Report, December, 1982), p.5.

which forecloses any of appellant's constitutional arguments.

Appellee does rely extensively on Gerzof v. Gulotta, 87 Misc. 2d 768, 386 N.Y.S. 2d 790 (Sup. Ct. Nassau 1976) affd. on other grnds. 57 A.D. 2d 821, 395 N.Y.S. 2d 26 (1st Dept. 1977), app. dism. 42 N.Y. 2d 960, 398 N.Y.S. 2d 146 (1977), a case which it cites as "40 N.Y. 2d 825, 386 N.Y.S. 2d 790, 87 Misc. 2d 768." Appellee's Brief, p. 5. On pages 6-8 and 10-11 of its Brief, appellee purports to quote extensively the "holdings" of that case. We must point out to the Court that appellee's quotations are of the "headnote" material contained in the unofficial report of a lower court decision, although from appellee's citation it would appear that the New York Court of Appeals was being quoted. The ruling of the lower court in Gerzof v. Gullotta, supra, was affirmed, but on

other grounds than those referred to by appellee. See 57 A.D. 2d 821.

Finally, in Point D of appellee's brief, appellee urges that this appeal be rejected under the abstention doctrine established in Younger v. Harris, 401 U.S. 37 (1971), also citing Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982).

It is obvious that appellee's argument is misplaced. Younger abstention is a doctrine which militates against federal court interference with pending state proceedings. Here, jurisdiction of the Court is being invoked on appeal. The New York state courts have had an ample opportunity to consider appellant's constitutional arguments, but have rejected them if only by their silence. As the Court has responded to a similar argument:

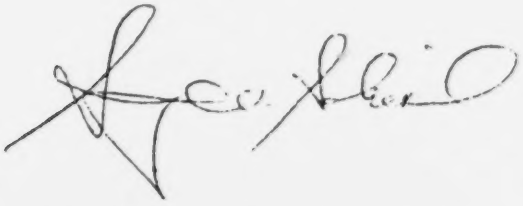
> "Virginia undoubtedly has broad powers to regulate the practice of law within its borders; but we have had occasion in the past to recognize that in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution."
>
> Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 6 (1964) (footnote omitted).

CONCLUSION

For the reasons set forth herein and in Appellant's Jurisdictional Statement, the Court should deny appellee's "motion to dismiss" and should take jurisdiction of this appeal, direct the submission of briefs and schedule the case for oral argument. Alternatively, it is respectfully requested that the Court treat appellant's papers herein as a

petition for a writ of certiorari and grant the writ.

Respectfully submitted,



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